(25)

No. 02-722-CFX Title: American Insurance Association, et al., Petitioners
v.
John Garamendi, Insurance Commissioner, State of California

Docketed:
November 12, 2002 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Nov 7 2002	Petition for writ of certiorari filed. (Response due December 12, 2002)
	Nov 26 2002	Application (02A441) to file a Brief in Opposition in excess of page limits, submitted to Justice O'Connor.
	Nov 27 2002	Application (02A441) denied by Justice O'Connor.
	Nov 27 2002	Motion of Chamber of Commerce of the United States, et al. for leave to file a brief as amici curiae filed.
	Dec 11 2002	Brief of respondent Harry Low, Commissioner of Insurance for State of California in opposition filed.
	Dec 12 2002	Brief amicus curiae of Bet Tzedek Legal Services filed. VIDED.
	Dec 12 2002	Brief amicus curiae of Federal Republic of Germany filed. VIDED.
	Dec 12 2002	Brief amicus curiae of United States filed. VIDED.
	Dec 12 2002	Brief amicus curiae of Government of Switzerland filed. VIDED.
	Dec 23 2002	Reply brief of petitioners American Insurance Assn. and American Re-Insurance Co. (TBP) filed. VIDED.
	Dec 23 2002	Supplemental brief of respondent Harry Low, Commissioner filed. VIDED.
	Dec 24 2002	DISTRIBUTED for Conference of January 10, 2003
	Jan 10 2003	Motion of Chamber of Commerce of the United States, et al. for leave to file a brief as amici curiae GRANTED.
	Jan 10 2003	Petition GRANTED. SET FOR ARGUMENT April 23, 2003. **********
	Feb 24 2003	Motion of Mitsubishi Materials Corporation, et al. for leave to file a brief as amici curiae filed.
	Feb 24 2003	Brief amicus curiae of United States filed.
	Feb 24 2003	Brief amici curiae of Chamber of Commerce of the United States, et al. filed.
	Feb 24 2003	Brief amicus curiae of Federal Republic of Germany filed.
	Feb 24 2003	Brief amicus curiae of Government of Switzerland filed.
	Feb 24 2003	Brief of respondents Gerling Companies in support of petitioners filed.
	Feb 24 2003	Joint appendix filed.
	Feb 24 2003	Brief of petitioners American Insurance Association, et al. filed.
	Feb 28 2003	Application (02A731) by respondent to file a respondent's brief on the merits in excess of page limits, submitted to Justice O'Connor.
	Mar 4 2003	Application (02A731) denied by Justice O'Connor.
	Mar 5 2003	Record filed.
	Mar 7 2003	CIRCULATED.
	Mar 10 2003	Motion of Mitsubishi Materials Corporation, et al. for

No. 02-722-CFX

Entry	Date	Proceedings and Orders
		leave to file a brief as amici curiae GRANTED.
	Mar 20 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Mar 24 2003	Brief amicus curiae of National Association of Insurance Commissioners filed.
	Mar 25 2003	Brief of respondent John Garamendi, Commissioner of Insurance filed.
	Mar 26 2003	Brief amici curiae of California, et al. filed.
	Mar 26 2003	Brief amici curiae of Bet Tzedek Legal Services and Simon Wiesenthal Center filed.
	Mar 26 2003	Brief amici curiae of Henry A. Waxman and 51 Members of Congress filed.
	Apr 7 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Apr 14 2003	Reply brief of petitioners American Insurance Association, et al. filed.
	Apr 16 2003	Reply brief of respondents Gerling Companies in support of petitioners filed.
	Apr 16 2003	LODGING consisting of twenty bound copies of related material received from counsel for Gerling, and distributed.
	Apr 23 2003	ARGUED.

Supreme Court, U.S.
FILED

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No. 02-

In the Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, AMERICAN RE-INSURANCE COMPANY, *ET AL.*,

Petitioners,

v.

HARRY LOW, IN HIS CAPACITY AS COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

California's Holocaust Victim Insurance Relief Act ("HVIRA") requires California insurers to provide extensive information regarding every insurance policy issued in Nazi-dominated Europe between 1920 and 1945 by any insurer with which the California insurer now has a legal relationship. The district court enjoined enforcement of the Act on three constitutional grounds: interference with the federal government's power over foreign affairs, due process, and the Foreign Commerce Clause. Over the objections of the U.S. government and affected foreign governments, and in direct conflict with *Gerling Global Reinsurance Corp.* v. *Gallagher*, 267 F.3d 1228 (11th Cir. 2001), the Ninth Circuit reversed and upheld the HVIRA in all respects.

The questions presented are:

1. Whether the HVIRA, which the U.S. government has called an "actual interference" with U.S. foreign policy, and which affected foreign governments have protested as inconsistent with international agreements, violates the foreign affairs doctrine of *Zschernig* v. *Miller*, 389 U.S. 429 (1968).

2. Whether the HVIRA, which attempts to regulate insurance transactions that occurred overseas between foreign parties more than half a century ago, exceeds California's legislative jurisdiction under the Due Process Clause.

3. Whether the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, insulates the HVIRA from review under the Foreign Commerce Clause.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The petitioners are: American Insurance Association ("AIA"), American Re-Insurance Company, Winterthur International America Insurance Company, Winterthur International America Underwriters Insurance Company, General Casualty Company of Wisconsin, Regent Insurance Company, Southern Insurance Company, Unigard Indemnity Company, Unigard Insurance Company, Blue Ridge Insurance Company, and Assicurazioni Generali S.p.A. In addition, Gerling Global Reinsurance Corporation of America, Gerling Global Reinsurance Corporation-U.S. Branch, Gerling Global Life Reinsurance Company, Gerling Global Life Insurance Company, Gerling America Insurance Company, and Constitution Insurance Company were parties to the proceedings below. The respondent, Harry Low, is the Commissioner of Insurance for the State of California.

AIA has no parent company, and no publicly held company owns stock in AIA.

American Re-Insurance Company is a wholly owned subsidiary of American Re Corporation, which is wholly owned by Munich-American Holding Company. Munich-American Holding Company is wholly owned by Muenchener Rueckversicherungs-Gesellschaft Aktiengesellschaft.

General Casualty Company of Wisconsin, Regent Insurance Company, Southern Insurance Company, Unigard Indemnity Company, Unigard Insurance Company, and Blue Ridge Insurance Company state that the following companies are parents or publicly held companies that own ten percent or more of their stock:

Winterthur U.S. Holdings, Inc. (parent and owner of more than ten percent of stock);

Winterthur Swiss Insurance Group (parent); and

Credit Suisse Group (parent).

Winterthur International America Insurance Company and Winterthur International America Underwriters Insurance Company are wholly owned by XL America Inc., which in turn is wholly owned by XL Capital Ltd.

Assicurazioni Generali S.p.A. ("Generali"), an Italian corporation, has no parent corporation. Mediobanca S.p.A., a publicly held company, owns slightly more than ten percent of Generali's stock.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals reversing the district court's permanent injunction (App., *infra*, 1a-33a) is reported at 296 F.3d 832. The opinion of the court of appeals reviewing the district court's preliminary injunction (App., *infra*, 34a-60a) is reported at 240 F.3d 739. The opinion of the district court granting a permanent injunction (App., *infra*, 61a-84a) is reported at 186 F. Supp.2d 1099. The district court's preliminary injunction opinion (App., *infra*, 85a-113a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2002. The court of appeals denied rehearing on September 9, 2002. App., *infra*, 3a-4a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant text of the Due Process Clause, the Commerce Clause, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, and the Holocaust Victim Insurance Relief Act, Cal. Ins. Code §§ 13800-13807, is set forth in the appendix (App., *infra* 114a-122a).

STATEMENT

After years of negotiations at the highest levels, the United States has reached agreements with foreign nations to achieve a prompt and comprehensive resolution of Holocaust-era insurance claims. An international commission has been established with authority to resolve claims. Payments are to be made from funds contributed by insurers, the German government and private industry. In return, the United States has committed to assist insurers in obtaining "legal peace" in this country, including protection against state legislative and regulatory action.

Dissatisfied with U.S. diplomatic efforts, the California legislature enacted a bill in 1999 designed to encourage and facilitate litigation over Holocaust-era insurance claims in California courts. The Holocaust Victim Insurance Relief Act, Cal. Ins. Code §§ 13800-13807 ("HVIRA"), which is part of that bill, requires insurers licensed to do business in California to provide records regarding each insurance policy issued by any European corporate relative and in effect in Nazi-occupied Europe between 1920 and 1945, for use in litigation in California. The HVIRA thus requires action by European insurers on policies that were written in Europe, under European laws, and sold to Europeans as long as 80 years ago, and imposes the penalty of license suspension on their California affiliates if they do not comply, even in cases where production of the information would violate foreign privacy laws. Other parts of the bill create a cause of action for Holocaust-era insurance claims and waive the applicable limitations period.

The United States has stated unequivocally that "the premise of the California legislation is in direct conflict with that of United States foreign policy"(2001 U.S. *En Banc Amicus* Br. 1), and affected foreign governments have lodged formal protests in court. The Eleventh Circuit has struck down substantially identical legislation enacted in Florida. *Gerling Global Reinsurance Corp.* v. *Gallagher*, 267 F.3d 1228 (2001).

Without so much as mentioning the submissions of the United States or the foreign governments, and distinguishing the Eleventh Circuit decision on transparently implausible grounds, the Ninth Circuit upheld the HVIRA against all constitutional objections. The decision thus presents a clear conflict between the circuits, as well as with official U.S. foreign policy. If it is allowed to stand, American assurances regarding the resolution of Holocaust-era claims will be cast into doubt, relations with our allies will be undermined, and the ability of the United States to speak with one voice in the field of foreign affairs will be severely compromised. Moreover, the precedent so established — that states may engage in their own

attempts to solve international problems, in disregard of U.S. foreign policy, the limits of state power over foreign commerce, and the lack of state legislative jurisdiction — has extraordinary constitutional importance. See *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000).

A. U.S. Foreign Policy On Holocaust-Era Claims.

1. Executive Agreement on the German Foundation.

The United States has been "involved in compensating Holocaust victims since the end of World War II." App., *infra*, 97a. It has now completed the last major post-war negotiation with Germany "to bring some measure of justice" to Holocaust survivors. *Id.* at 126a-127a. In July 2000, President Clinton and German Chancellor Schroeder successfully completed negotiations for creation of the "Foundation, 'Remembrance, Responsibility and the Future,'" funded by the German government and German corporations to resolve the claims of those "who suffered at the hands of German banks, insurance companies, and other German companies." ER 1748-1749.[1] In return for creation of a 10 billion Deutschemark ($5 billion) Foundation to pay Holocaust claims, the President pledged to take "unprecedented steps" on behalf of the United States — including the filing of statements of interest in litigation in U.S. courts against German companies over Holocaust claims — to have the Foundation "regarded as the exclusive remedy for all claims against German companies." *Ibid.* One billion Deutschemarks "will go to property claims and insurance claims, as well as property and insurance humanitarian funds." ER 2272.

Deputy Secretary of the Treasury Stuart Eizenstat, the principal U.S. representative in negotiations on the German Foundation, explained that the "crucial element" in convincing German companies to participate in the Foundation was the

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[1] "ER" refers to the Excerpts of Record in the preliminary injunction appeal and "SER" refers to the Supplemental Excerpts of Record in the permanent injunction appeal.

assurance "that they not pay twice, once into this foundation and a second time into U.S. courts." ER 1872-1881. Secretary of State Madeleine Albright similarly observed that (ER 1750-1752):

> [t]he United States is agreeing to assist in providing legal peace to German companies, both in our courts and from state and local action. * * * Chancellor Schroeder and the German companies took the lead in proposing the Foundation as an alternative to endless litigation that would have drained everyone and satisfied no one.

In Article 1 of the Executive Agreement between the United States and Germany, the parties agreed that the Foundation should be "the exclusive remedy and forum for the resolution of all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II." App., *infra*, 155a. Article 2 imposes two duties on the United States government: (1) to "inform its courts through a Statement of Interest * * * that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving [Holocaust-era] claims asserted against German companies"; and (2) to "use its best efforts" "with state and local governments" to achieve "all-embracing and enduring legal peace" for German companies. *Id.* at 156a. Finally, the Agreement mandates that insurance claims against German insurance companies that come within the scope of the current claims-handling procedures adopted by the International Commission on Holocaust Era Insurance Claims ("ICHEIC") "shall be processed * * * on the basis of such procedures and on the basis of additional claims handling procedures that may be agreed among the Foundation, ICHEIC, and the German Insurance Association." *Ibid.*

ICHEIC was established in 1998 to investigate and resolve Holocaust-era insurance claims. Deputy Secretary Eizenstat testified before Congress that the "U.S. Government has supported [ICHEIC] since it began, and we believe it should be

considered the exclusive remedy for resolving insurance claims from the World War II era." ER 1905. Negotiations involving ICHEIC, the German Foundation, and the German Insurance Association have culminated in an agreement on claims handling procedures and other related issues. App., *infra*, 177a. The Bush Administration intervened to "facilitate" these negotiations. *US Agrees to Facilitate Talks on Holocaust-Era Claims*, AGENCE FRANCE PRESSE, July 18, 2001.

President Bush and Chancellor Schroeder have recently reaffirmed their commitment to the Executive Agreement on the German Foundation and its goal of "all embracing and enduring legal peace." App. *infra*, 172a. In addition, as Ambassador Randolph Bell, President Bush's Special Envoy for Holocaust Issues, told Congress on September 24, 2002, the United States continues to believe that ICHEIC, should be "the *exclusive remedy* for unresolved insurance claims from the National Socialist era and World War II." *Id.* at 177a (emphasis added).

2. Other Foreign Foundations and Commissions.

The United States has concluded an Executive Agreement with Austria similar to its Agreement with Germany. 2001 U.S. *En Banc Amicus* Br. 14. Other European nations, including France, Belgium, the Netherlands, and Italy, have agreed to support commissions and foundations in their own countries. See App., *infra*, 134a-150a; SER 1623, 1908.

In January 2000, the United States and Switzerland issued a Joint Statement addressing the issue of unpaid Holocaust-era insurance policies. SER 1263-1274. The United States again identified ICHEIC as the "appropriate forum for resolving Holocaust-related issues." SER 1267. Switzerland and the United States condemned as "potentially disruptive and counterproductive * * * investigative initiatives" that impose reporting requirements. *Ibid.* The governments agreed that the United States would "call on" state insurance commissioners and legislatures "to refrain from taking unwarranted investiga-

tive initiatives or from threatening or actually using sanctions against Swiss insurers." SER 1272.

Referring to these international initiatives, Deputy Secretary Eizenstat stated that U.S. policy (ER 2271)

> on Holocaust issues * * * serves important U.S. foreign policy interests, such as maintaining close relations with Germany, a partner of ours in promoting and defending democracy for the last fifty years and a nation that is vital to both the security and economic development of Europe and, with Switzerland, a major trading partner.

B. California's Regulation of Holocaust-Era Insurance Policies.

In the midst of these wide-ranging diplomatic efforts, the California legislature enacted the HVIRA. The statute requires the California Insurance Commissioner to establish a "Holocaust Era Insurance Registry" to maintain "records and information" on all "life, property, liability, health, annuities, dowry, educational, or casualty" insurance policies "in effect between 1920 and 1945" that were sold by a California "insurer," either "directly or through a related company," to persons in Nazi-occupied Europe. §§ 13803-13804.

The HVIRA provides that each "insurer currently doing business in the state" that sold Holocaust-era policies directly to individuals, or that is "related" to a company that sold Holocaust-era policies, must file detailed reports with the Insurance Commissioner specifying (1) the number of policies the insurer or its related company had in effect during this 25-year period; (2) the name of the holder and beneficiary of each of those policies, and the "current status" of each policy; and (3) the "city of origin, domicile, or address" for each policyholder. § 13804(a). The HVIRA further requires that, for each such policy, the insurer must state, under the threat of criminal penalty (§ 13804(b)), whether the policy has been paid, whether diligence has been used to identify beneficiaries, and whether

unclaimed funds have been distributed to charitable organizations. App., *infra*, 119a-121a.

Through an expansive definition of "related company," the HVIRA extends these requirements to California insurers that never issued any policies in Nazi-occupied Europe but that now have a corporate "parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate" that did. § 13802(b). The Act also requires insurers to file reports not only on policies that were held by "Holocaust victim[s]" — defined as any "person who was persecuted during the period 1929 to 1945, inclusive, by Nazi Germany, its allies, or sympathizers," § 13802(a) — *but on all policies held by all persons in Europe between 1920 and 1945*. § 13804(a). Finally, the Act directs the Commissioner to "suspend" the "certificate of authority to conduct insurance business in the state" of any insurer that does not comply with its requirements. § 13806.

The HVIRA is an integral part of a comprehensive California Holocaust compensation program, designed to enable Holocaust victims and their heirs to file lawsuits in California under California law to compel payment of Holocaust-era insurance claims that arose outside the State (and, indeed, outside the United States). In related sections of the same bill that enacted the HVIRA, the legislature amended § 354.5 of the Code of Civil Procedure to create a California forum for Holocaust-era insurance litigation and to override any applicable statutes of limitations under foreign law.

This legislation also circumvents otherwise applicable jurisdictional limits by authorizing suit against an entity other than the issuer of a Holocaust-era policy. Any insurer doing business in California may be held liable for a Holocaust-era policy issued by any of its "related compan[ies]" — whether or not the California company exercises any control over that related company. § 354.5(a)(3). It is not even necessary for the companies to have been related at the time the policy was issued, so long as they are related at the time of suit. *Ibid.*

Under this scheme, a California insurer that was established in 2001 would be forced to pay a civil claim arising from a 1921 insurance policy, so long as the European entity that issued the policy is now a corporate "parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate" of the California insurer. § 354.5(a)(2).

C. Complaints By U.S. Officials That The HVIRA Conflicts With U.S. Foreign Policy.

Shortly after the HVIRA was enacted, Deputy Secretary Eizenstat wrote to California Governor Gray Davis and Insurance Commissioner Chuck Quackenbush complaining of the serious disruption of U.S. foreign policy caused by the HVIRA. He warned the Governor that the HVIRA "ha[s] already potentially damaged and could derail [German Foundation] negotiations and the progress already achieved by [ICHEIC]," because, "for th[e German Foundation] deal to work[,] * * * German industry and the German government need to be assured that they will get 'legal peace,' not just from class-action lawsuits, but from the kind of legislation represented by the [HVIRA]." App., *infra*, 124a.

In his letter to the Commissioner, the Deputy Secretary criticized the HVIRA as having "the unfortunate effect of damaging the one effective means now at hand to process quickly and completely unpaid insurance claims from the Holocaust period, [ICHEIC], in which you yourself have been so engaged." ER 1973-1974. He made clear (*id.* at 1974) that California's actions "threaten[ing] * * * sanctions against German insurers could complicate my ability to resolve the other claims against German companies for the benefit of Holocaust survivors."

In April 2000, Deputy Secretary Eizenstat explained to the Senate Foreign Relations Committee that the HVIRA threatened to undermine the progress made in resolving Holocaust-era claims. He testified that he corresponded with (ER 2277):

> the state insurance commissioners in Washington State and California, emphasizing my strong support for the international efforts to create a claims settlement process * * * and stressing that, in their legitimate concern for Holocaust survivors, proposed actions in these states could undermine the work of the ICHEIC.

Deputy Secretary Eizenstat underscored that the federal government's support of ICHEIC was "link[ed]" in important ways to the Nation's general "policy on Holocaust issues," which, in turn, furthers "important U.S. foreign policy interests" across Europe. ER 2271, 2276.

D. The Preliminary Injunction.

Despite the federal government's pleas for non-interference, Commissioner Quackenbush announced a policy of immediate and rigorous enforcement of the HVIRA. ER 1982-1989. He subpoenaed insurers to testify at hearings as to their readiness to comply and told the companies to either produce the required records or "leave the State." ER 1986-1988. The Commissioner also offered his judgment that the international process for claims resolution "has not succeeded to this date, and California can't wait around any longer. It is your choice now whether you're going * * * to bring your company in full compliance, whether you're going to leave the state voluntarily, or whether I'm going to kick you out." ER 1989.

Petitioners thereafter filed suit to challenge the constitutionality of the Act and sought a preliminary injunction to protect against immediate enforcement. The district court granted the preliminary injunction, determining that petitioners "ha[d] shown a probability of success on the merits of their claim[s] and ha[d] shown that irreparable harm will occur if the court does not enjoin enforcement of the HVIRA." App., *infra*, 113a.

In an extensive opinion relying on decisions of this Court, the district court held that the HVIRA was likely to be facially unconstitutional on two grounds. First, the statute "intrude[s]

into 'matters which the Constitution entrusts solely to the Federal Government.'" App., *infra*, 100a-105a (quoting *Zschernig* v. *Miller*, 389 U.S. 429, 436 (1968)). Second, the HVIRA violates the Foreign Commerce Clause because it "potentially prevents the federal government from speaking with one voice in its expectations of foreign insurance companies" and impermissibly "meddl[es] in foreign commerce entirely outside its borders." App., *infra*, 106a-110a.

The Commissioner appealed to the Ninth Circuit. In opposition to that appeal, the United States filed an *amicus* brief stating that the HVIRA "impairs the ability of the United States to conduct the nation's foreign policy," in violation of the Constitution's foreign affairs power. 2001 U.S. *Amicus* Br. 33-34. The U.S. government explained that "both Germany and Switzerland have protested to the State Department California's attempt to regulate the conduct of German and Swiss insurers with respect to insurance policies written in those countries." *Ibid.* It also expressed serious doubt as to the HVIRA's validity under the Commerce Clause. The government concluded that "the McCarran Ferguson Act does not shield extraterritorial [insurance] regulation" from scrutiny under the Commerce Clause, especially "where the State law has a discriminatory * * * effect in foreign countries." *Id.* at 30. The Federal Republic of Germany filed an *amicus* brief as well, stating that country's opposition to the HVIRA.

The Ninth Circuit overturned the district court's decision. Without mentioning the submissions by the United States and Germany, and dismissing the relevant international agreements as mere "executive branch initiatives," the court of appeals concluded that the HVIRA poses no conflict with U.S. foreign policy. App., *infra*, 45a-59a. The court even questioned the validity of the foreign affairs doctrine, stating that *Zschernig* "has been applied * * * sparingly" and "does not govern" (*id.* at 56a-59a). In addition, the court held as a matter of law that the McCarran-Ferguson Act shields the HVIRA from Commerce Clause scrutiny because the HVIRA "is a California

insurance regulation of California insurance companies that affects foreign commerce only indirectly." *Id.* at 45a. The court of appeals remanded for consideration of petitioners' due process claim, while leaving the injunction temporarily in place.

Petitioners sought rehearing. Again, the U.S. government and Germany filed briefs in support, this time supplemented by an *amicus* brief from Switzerland stressing the inconsistency between the HVIRA and its negotiated agreements with the United States. Nonetheless, rehearing was denied.

Petitioners then filed a certiorari petition and this Court called for the views of the Solicitor General. 122 S. Ct. 29 (2001). Before the government filed its brief, the district court entered a permanent injunction on other grounds, and petitioners withdrew their petition.

E. The District Court's Permanent Injunction And Reversal By the Ninth Circuit.

On remand, petitioners argued that the HVIRA violates due process and presented evidence that it is impossible for California insurers to obtain all the information required under the HVIRA and that, even if they could, such disclosure would violate European disclosure laws. App., *infra*, 72a, 80a. The district court held that the HVIRA does not exceed California's legislative jurisdiction under the Due Process Clause. App., *infra*, 74a. The court concluded, however, that by mandating license suspension for non-performance of impossible tasks, the HVIRA deprives petitioners of a protected property interest without due process of law. Accordingly, it permanently enjoined enforcement of the statute. *Id.* at 75a-83a.

On appeal, the United States and Germany again filed briefs in support of petitioners. The Ninth Circuit again reversed, holding that the HVIRA does not violate due process. The court of appeals agreed with the district court's legislative jurisdiction ruling, purporting to distinguish the intervening contrary

decision of the Eleventh Circuit in *Gerling*. App., *infra*, 8a-20a. The court of appeals reversed the district court's decision on substantive and procedural due process. Finally, the Ninth Circuit affirmed its prior decision on petitioners' foreign affairs and Commerce Clause claims, concluding: "[w]e are not persuaded that we erred." *Id.* at 29a.

On petition for rehearing, the United States once more informed the court of appeals that the HVIRA implicates "significant foreign policy concerns" involving close allies of the United States and that the statute constitutes "not merely a theoretical, but an actual interference with the United States' conduct of foreign policy, that undermines the Constitution's exclusive grant to the national government of authority to conduct foreign policy." 2002 U.S. *En Banc Amicus* Brief at 1, 15. Rehearing was denied.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has decided three questions contrary to decisions of this Court and in conflict with decisions of other courts of appeals. In so ruling, the court has authorized state interference with American foreign policy on the important subject of Holocaust-era insurance claims and has undermined the authority of the President to conduct the foreign relations of the United States. Review by this Court is essential.

I. THE NINTH CIRCUIT ERRED IN REFUSING TO APPLY THE FOREIGN AFFAIRS DOCTRINE TO A STATE STATUTE "IN DIRECT CONFLICT WITH" U.S. FOREIGN POLICY

The United States' bilateral agreements with Germany and Austria and Joint Statement with Switzerland represent the culmination of more than 50 years of diplomatic efforts to obtain compensation for victims of the Holocaust. The agreements are designed to resolve — once and for all — claims arising out of Nazi confiscations of property during World War II. Their hope of achieving an "all embracing and enduring

legal peace" rests directly on the goal of an "exclusive remedy and forum" for resolving Holocaust-era claims, including insurance claims. App, *infra*, 153a-155a.

It is difficult to overstate the conflict between the approach of the federal government and that of California. The federal solution rests on the premise that relief for *all* Holocaust-era claimants is best achieved if claims are resolved in an international forum; the California solution rests on the notion that foreign insurers may be called to account on a *piecemeal* basis in the courts of the 50 states.[2] The United States believes that European insurers should be required to pay claims only *once*, from a single fund containing a pre-determined sum; California believes that insurers may be forced to pay *twice* in undisclosed amounts solely out of their own pockets. The premise of the United States' agreements is that payment for wrongs committed overseas during a world war is a matter of exclusive *federal* concern; the premise of the HVIRA is that *states* may assert control over foreign companies that have never done business within their borders for acts committed on another continent more than 60 years ago.

In other words, just as the United States and European nations have reached closure on exclusive procedures to resolve Nazi-era insurance claims through international institutions, California seeks to impose its own solution through California insurance regulation and California litigation, rendering illusory the promise of "legal peace." The conflict with U.S. foreign policy could not be more clear.

The United States, German, and Swiss governments have strenuously objected to the HVIRA. For example, the United States has stated unequivocally that "the premise of the California legislation is in direct conflict with that of United States foreign policy." 2001 U.S. *En Banc Amicus* Br. 1. The

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[2] This is more than an abstract concern: within days of the ruling below, several other states (including Rhode Island and New Jersey) began considering similar legislation. 2001 U.S. *En Banc Amicus* Br. 2.

statute "runs afoul" of the principle that "the nation speaks with one voice in foreign affairs" by "creating new regulatory burdens and incentives to litigation in an area that has been the subject of intense diplomatic negotiation fraught with the potential for international misunderstanding." *Id.* at 3-4.

Germany reiterated these concerns, stating that "the HVIRA threatens the fundamental principle upon which the Executive Agreement was negotiated: the objective that the Foundation would be the exclusive remedy and forum for resolution of all claims asserted against German companies arising from the Nazi era." 2001 FRG *En Banc Amicus* Br. 3-4. By design and effect, Germany has explained, "the HVIRA fosters precisely the sort of litigation that, according to the Executive Agreement, should be dismissed 'in the foreign policy interest' of the United States and Germany." *Id.* at 4.

Ignoring these official declarations, the Ninth Circuit upheld the HVIRA against a challenge under the foreign affairs doctrine. That ruling conflicts with this Court's decisions and with fundamental structural principles of our Constitution.

A. The Decision Is In Direct Conflict With *Zschernig*.

1. The Constitution does not permit an individual state to fashion its own solution to an international problem, to the detriment of the federal government's ability to implement a comprehensive resolution. In a series of cases beginning with *Chy Lung* v. *Freeman*, 92 U.S. 275 (1875), cited recently in *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 381-382 n.16 (2000), this Court has declared that authority over foreign affairs belongs *solely* to the federal government. See, *e.g.*, *United States* v. *Pink*, 315 U.S. 203, 233 ("Power over external affairs is not shared by the States"). In the leading case, *Zschernig* v. *Miller*, 389 U.S. 429, 434-435 (1968), the Court held that state statutes having "more than some incidental or indirect effect in foreign countries," or having "great potential for disruption or embarrassment" of U.S. foreign policy, are unconstitutional.

This is an *a fortiori* case under *Zschernig*. There, the Court addressed the validity of a state probate law that blocked the distribution of an estate to a foreign heir if the property was subject to confiscation by foreign officials. No international negotiations or federal statutes bore on the subject; the law involved an area "traditionally regulated" by the states; and the United States government denied that it "interfere[d] with [its] conduct of foreign relations." 389 U.S. at 434. This Court nonetheless struck down the state statute. Noting that application of the statute would require "inquiries concerning the actual administration of foreign law [and] into the credibility of foreign diplomatic statements," the Court reasoned that this "intrusion by the State into the field of foreign affairs" threatened to "adversely affect the power of the central government to deal with those problems [of foreign relations]." *Id.* at 432, 441.

The conflict with foreign policy here is far more direct. The stated goal of the HVIRA is to affect international policy — to "encourage the development of a resolution to these [insurance claim] issues through the international process or through direct action by the State of California, as necessary." Cal. Ins. Code § 13801(f). While this *goal* may appear to be consonant with American policy, the *means* selected by California lawmakers — imposition of onerous disclosure requirements to facilitate drawn-out litigation — are directly contrary to the premise of federal negotiations with foreign nations, which is to resolve *all* claims expeditiously under the terms of international agreements. See *Crosby*, 530 U.S. at 379-380 (noting that the Massachusetts Burma Act conflicted with federal policy despite having "a common end"). Indeed, the means selected have direct impacts overseas, because the HVIRA imposes a draconian penalty on any California insurer whose European affiliates fail to take action on European contracts with European citizens — to the point of requiring such companies to violate foreign privacy laws. See, *e.g.*, ER 1123-1126.

Thus, the HVIRA has "more than some incidental or indirect effect in foreign countries" and presents "great potential" — indeed, actuality — "for disruption or embarrassment" of American foreign policy. *Zschernig*, 389 U.S. at 434-435. The United States has declared that the HVIRA constitutes an "actual interference" with American foreign policy. 2002 U.S. *En Banc Amicus* Br. 15.

2. The Ninth Circuit did not seriously dispute this. Rather than explain why the views of the United States and foreign governments regarding the foreign policy implications of the HVIRA should be disregarded, the court of appeals simply ignored them. Instead, it questioned *Zschernig*'s current vitality. Pointing out that the foreign affairs doctrine "is rarely invoked by the courts; the Supreme Court has not applied it in more than 30 years," the Ninth Circuit reasoned that "[b]ecause *Zschernig* has been applied so sparingly," it should "hesitate to apply [it]" to this case. App., *infra*, 59a. Putting aside the fact that it is not the place of lower courts to disregard governing precedent — whether "sparingly" applied or not (*Agostini* v. *Felton*, 521 U.S. 203, 237 (1997)) — the court of appeals failed to notice that this Court cited the foreign affairs doctrine with approval in *Crosby*, 530 U.S. at 381-382 n.16.

For the Ninth Circuit to rule that states have authority to pass laws interfering with the conduct of U.S. foreign policy is an astounding proposition, demanding review by this Court. It is precisely this state of affairs that the national Union was created to prevent and that this Court's foreign affairs doctrine is designed to address. As Alexander Hamilton observed: "No nation acquainted with the nature of our political association would be unwise enough to enter into stipulations with the United States, * * * while they were apprised that the engagements on the part of the Union might at any moment be violated by its members." THE FEDERALIST NO. 22, at 144.

3. Beyond its disparagement of the continued authority of *Zschernig*, the Ninth Circuit offered four points that supposedly

distinguished that case. *First*, it noted that here "[n]o Plaintiff is a foreign government." App., *infra*, 58a. But that does not distinguish this case from earlier foreign affairs cases. *Chy Lung* involved insulting treatment of Chinese nationals in the United States; *Zschernig* involved the rights of individuals in Communist countries to inherit property in Oregon; neither involved a foreign government. "Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted or permitted by a government." *Zschernig*, 389 U.S. at 441. The President must be able to negotiate with respect to foreign subjects as well as foreign nations.

In addition, by regulating foreign insurers, the HVIRA is usurping foreign regulatory authority, which foreign nations certainly regard as affecting their "sovereign interest." 2001 FRG *Amicus* Br. 1. As Germany has explained (*id.* at 1-5), the HVIRA plainly seeks to force action by German insurers, by threatening to suspend the licenses of their California affiliates. Moreover, the information demanded by the HVIRA cannot be produced without violating German law, which imposes criminal penalties for unauthorized disclosure. *Ibid.*

Second, the court below noted that the "HVIRA does not refer to any particular country." App., *infra*, 58a. But neither did the law in *Zschernig*. In any event, the HVIRA on its face is directed toward specific European countries and reflects a judgment that the judicial process and regulatory authority of those countries — notably Germany — cannot be trusted.

Third, the court below stated (App., *infra*, 58a) that "there is no evidence that HVIRA would be applied in a way that would implicate the diplomatic [matters] mentioned in *Zschernig*." This statement is inexplicable. If *amicus* briefs by the United States and foreign governments and formal protests by federal officials to the Governor and the Insurance Commissioner do not constitute such evidence, it is hard to imagine

what would. This is precisely the sort of evidence on which the Court relied in *Crosby* to substantiate the "threat to the President's power to speak and bargain effectively with other nations." 530 U.S. at 382.

Fourth, the court below noted that this is a facial challenge and *Zschernig* was not. But *Zschernig* involved a law that, on its face, did not engage in extraterritorial regulation or pass judgment on foreign affairs. Only in light of its application by Oregon courts was the statute revealed as violating the foreign affairs power. 389 U.S. at 433. Here, the very purpose of the HVIRA is to interfere with the international means for resolving Holocaust-era claims, and it is having that effect in practice. *Zschernig*'s emphasis on the "potential" for disruption of U.S. foreign policy confirms that there is no need for case-by-case proof of actual effects.

These attempts to distinguish *Zschernig* are so far off the mark that they are tantamount to a refusal to follow directly controlling Supreme Court precedent. That alone is sufficient basis for a grant of certiorari.

B. The Decision Conflicts With The First Circuit's Decision In *Natsios*.

In addition to conflicting with this Court's decision in *Zschernig*, the decision below conflicts with the First Circuit's decision in *National Foreign Trade Council* v. *Natsios*, 181 F.3d 38 (1st Cir. 1999). There, the court held unconstitutional under the foreign affairs doctrine a Massachusetts law banning state business transactions with companies that do business in Burma. This Court granted certiorari and affirmed on preemption grounds, but it did not disagree with the First Circuit's foreign affairs doctrine analysis.

The decision below conflicts with *Natsios* in two important respects. First, and most significantly, the First Circuit rejected the argument that *Zschernig* "is a weak precedent" (181 F.3d at 52) and did not "hesitate" to apply it. Second, the First Circuit

rejected the grounds for distinction relied on by the Ninth Circuit. *Natsios*, like this case, involved a statute that was directed against private companies; *Natsios*, like this case, involved a facial challenge; and in *Natsios*, as in this case, the fact that the effect on foreign affairs was more than "incidental or indirect" was demonstrated by examining the purpose and effect of the law and protests from the State Department and other nations. While no two foreign affairs cases are likely to be identical, the conflict between these two decisions is substantial and warrants this Court's review.

C. The Decision Interferes With U.S. Foreign Policy In An Area Of Vital International Concern.

Even in the absence of these conflicts, the singular importance of this matter — "actual interference" with U.S. foreign policy on Holocaust issues, 2002 U.S. *En Banc Amicus* Br. 15 — would warrant this Court's attention. The Court recently has referred twice to the pressing need to resolve legal issues with an impact on American foreign policy. See *JPMorgan Chase Bank* v. *Traffic Stream (BVI) Infrastructure Ltd.*, 122 S. Ct. 2054, 2057 (2002); *Christopher* v. *Harbury*, 122 S. Ct. 2179, 2185 (2002). That is especially true where the Executive has negotiated an international agreement and its effectuation depends on court action. In *Dames & Moore* v. *Regan*, 453 U.S. 654, 668 (1981), for example, the Court granted certiorari before judgment in the court of appeals to determine the legality of an Executive Agreement reached with Iran to resolve the Iranian hostage situation. The effectuation of prompt relief for Holocaust survivors is likewise of "imperative public importance." *Id.* at 667. See also *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 493 (1983) ("the primacy of federal concerns is evident" in cases "rais[ing] sensitive issues concerning the foreign relations of the United States") (citing *Zschernig*).

This Court has not hesitated to grant certiorari to resolve issues with a similar impact on foreign policy. See *Weinberger*

v. *Rossi*, 456 U.S. 25 (1982); *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 689-690 (1976); *First National City Bank* v. *Banco Nacional of Cuba*, 406 U.S. 759, 761-762 (1972); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 407 (1964); *Regan* v. *Wald*, 468 U.S. 222 (1984). Until the decision below is reviewed and reversed, there will be a cloud over the ability of the President to negotiate with foreign nations to achieve diplomatic solutions. If states are free to undermine international agreements, other countries will be reluctant to enter into them.

II. THE NINTH CIRCUIT FAILED TO APPLY THIS COURT'S DUE PROCESS PRECEDENTS AND CREATED A CONFLICT WITH THE ELEVENTH CIRCUIT'S DECISION IN *GERLING*

1. The HVIRA also cannot survive scrutiny under the Due Process Clause, which precludes California from applying its "substantive law to factual and legal situations with which it has little or no contact." *McCluney* v. *Jos. Schlitz Brewing Co.*, 649 F.2d 578, 580 (8th Cir.), aff'd, 454 U.S. 1071 (1981). Accord, *e.g.*, *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 819-822 (1985); *Home Ins. Co.* v. *Dick*, 281 U.S. 397, 407-408 (1930). This Court's decisions on legislative jurisdiction "stand for the proposition that if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional." *Allstate Ins. Co.* v. *Hague*, 449 U.S. 302, 310-311 (1981) (plurality opinion).

The Eleventh Circuit in *Gerling* applied these due process principles to invalidate Florida's Holocaust Victims Insurance Act. The Florida statute, just like the HVIRA, imposed extensive reporting requirements on Florida affiliates of European insurers that issued policies in Europe during the Holocaust in order to create an insurance registry that would assist in the collection of Holocaust-era insurance proceeds through litigation. The Eleventh Circuit held that the statute exceeded Florida's legislative jurisdiction (267 F.3d at 1238):

> The subject of the * * * Act is Holocaust-era insurance policies and the payment of claims still due under those policies. While there may be a connection between the State of Florida and that subject to the extent it relates directly to the activities of Florida insurers, there is virtually *no* connection between the State of Florida and that subject to the extent it concerns insurance transactions involving Plaintiffs' German affiliates that took place years ago in Germany, among German residents, under German law, relating to persons, property, and events in Germany.

This case is indistinguishable from *Gerling*. California, like Florida, lacks sufficient contacts with the transactions and parties subject to the HVIRA to sustain its assertion of legislative jurisdiction. The entire purpose of the Act is to use the fortuity of a company's license in California as a lever to compel action by *European* insurers relating to *European* insurance transactions. It is undisputed that each and every policy that gives rise to a reporting obligation under California law was issued in Europe, to European citizens, by European insurers, and that any losses under those policies occurred in Europe and were suffered by European parties. The enormous burden of complying with the HVIRA thus falls on European (not California) insurers. The only nexus that California could possibly claim is the fact that — decades after the events in question — a small number of Holocaust survivors (or their heirs) moved to California. See § 13801(d). But this Court has held that a party's post-transaction change of residence does not justify a forum state's exercise of legislative jurisdiction over a foreign transaction. *Shutts*, 472 U.S. at 820.

2. The Ninth Circuit refused to follow *Gerling*, offering three purported distinctions. *First*, "Florida's insurance commissioner issued subpoenas addressed to Florida-licensed insurers *and their foreign affiliates*." App., *infra*, 10a n.3. But the subpoenas in that case were enforceable only against Florida-licensed insurers (not their foreign affiliates) by suspension of their licenses and, as here, only locally-licensed

insurers were parties to the case and challenged the statute. Moreover, the California Insurance Commissioner in this case (like his counterpart in Florida) demanded direct access to the California-licensed insurers' foreign affiliates and their records. ER 1111-1115.

Second, the Ninth Circuit asserted that the Eleventh Circuit "held that the sole purpose of the Florida statute was the payment of Holocaust-era claims," whereas the HVIRA has other purposes. App., *infra*, 10a. This is not true. As in *Gerling*, 267 F.3d at 1230, the only *explicit* purpose of the HVIRA (see § 13801), which the Ninth Circuit previously acknowledged (App., *infra*, 44a), is the identification and facilitation of payment of Holocaust-era insurance claims. Like the Commissioner here, the Florida Insurance Commissioner in *Gerling* argued that the real purpose of the Florida statutory "reporting provisions" was "to regulate Florida insurers, as opposed to their European affiliates," and that these provisions were "necessary to confirm the claims payment practices, solvency and 'good character' of the Florida insurer." 267 F.3d at 1238-1239.The only difference is that, unlike the Ninth Circuit, the Eleventh Circuit *rejected* these arguments (*id.* at 1239-1240):

> The Commissioner's position * * * cannot be squared with the Legislature's own unequivocal statement of its purpose. The sole express purpose of the Holocaust Victims Insurance Act does not demonstrate a concern with the good character, solvency, or present payment practices of Florida insurers; indeed, the Legislature's inclusion of the claims recovery provisions in the same statute *itself* belies any suggestion that the reporting provisions are really intended to protect ordinary policyholders * * *.

As the United States recognized in its briefs below, "[t]he explicit purpose of the [HVIRA] is not to regulate the operations of insurance companies in California, but to facilitate recovery on claims regarding Holocaust-era insurance policies issued abroad." 2001 U.S. *En Banc Amicus* Br. 8.

Third, the Ninth Circuit focused on the fact that Florida included its reporting provisions and claims-payment provisions in the same statute. App., *infra*, 10a-11a. This purported distinction is baseless. California enacted the reporting statute and claims-payment provisions in the same bill (AB 600).

At the end of the day, the Ninth Circuit was unable to distinguish *Gerling* and simply expressed disagreement with the Eleventh Circuit's "interpretation of the legislative jurisdiction doctrine." App., *infra*, 11a. It thus acknowledged an important circuit conflict.

3. The court of appeals also attempted to avoid application of the legislative jurisdiction doctrine by characterizing the HVIRA as "nothing more" than a reporting statute that "seek[s] information from California licensed insurers. Therefore, the Commissioner need not prove that minimum contacts exist." App., *infra*, 20a

But disclosure regulation is not exempt from due process principles applicable to legislative jurisdiction. No one would suggest, for example, that requiring issuers of securities to "report" detailed information on their business operations is not a form of "regulation." Requiring political candidates to report contributions is surely "regulation." Disclosure of extensive information about foreign insurance policies is no less of a regulatory burden than any of the other reporting obligations that the federal and state governments impose on their citizens. Indeed, it is more onerous given the voluminous nature of the materials sought from a time period 50 to 80 years ago and the threatened infringement of European privacy laws. As the Ninth Circuit itself recognized, "[s]eeking information from insurers about their claims-paying record, to be used in the licensing process, is a form of regulating the business of insurance." App., *infra*, 45a n.3.

In short, the Ninth Circuit has held that states (through their power over insurance companies doing business within their borders) have authority to regulate the business of insurance in

Europe, with respect to policies issued by European companies to European policyholders. In so holding, it has evaded the force of this Court's precedents and created a square conflict with the Eleventh Circuit. Due process limits on legislative jurisdiction carry special force in the international context, where the sovereign interests of other nations are implicated. See *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 116 (1987) (due process limits on state legislative jurisdiction require "[g]reat care and reserve" in "the international context," where "[t]he procedural and substantive policies of other nations * * * are affected"). This case plainly warrants review.

III. THE NINTH CIRCUIT'S INTERPRETATION OF THE McCARRAN-FERGUSON ACT CONFLICTS WITH THIS COURT'S HOLDINGS AND ENCOURAGES STATE INTERFERENCE WITH FOREIGN COMMERCE

The court of appeals also went fatally astray in its treatment of the Foreign Commerce Clause. The Ninth Circuit's holding that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, shields California's regulation of the *overseas* activities of insurance companies from the reach of the Clause is flatly inconsistent with a controlling decision of this Court and creates grave uncertainty about the scope of an oft-cited federal statute that has great practical importance. Because the court of appeals made this error in a foreign commercial setting that "is pre-eminently a matter of national concern" and where "[t]he need for federal uniformity is * * * paramount" (*Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 448, 449 (1979)), review by this Court is essential.

A. The HVIRA Violates The Foreign Commerce Clause.

Petitioners and the United States argued below, and the district court held, that the HVIRA is unconstitutional under the Foreign Commerce Clause both because the statute has an impermissible extraterritorial effect and because it causes disruption in an area where a uniform national approach is

necessary. App., *infra*, 106a-110a. As the United States explained, the HVIRA runs afoul of the Clause by imposing regulatory requirements on insurance policies that "have no nexus with California," by "subject[ing] insurance corporations to conflicting legal obligations," by engaging in "extraterritorial regulation," and by imposing burdens on international commerce "that diverge from the foreign policy interests of the nation." 2001 U.S. *Amicus* Br. 18, 19, 21, 24-25. The Clause bars that sort of state interference with foreign commerce because it may foment "international disputes" and lead other nations to "retaliate against American-owned instrumentalities present in their jurisdictions." *Japan Line*, 441 U.S. at 450.

B. The Ninth Circuit Erred In Holding That The McCarran-Ferguson Act Shields The HVIRA From Commerce Clause Scrutiny.

The Ninth Circuit did not deny that the HVIRA violates the Foreign Commerce Clause if it is applicable. Instead, it held that the Commerce Clause is rendered irrelevant by Section 2(a) of the McCarran-Ferguson Act. App., *infra*, 40a-45a.[3] That holding is indefensible. As the United States argued below, McCarran-Ferguson is inapplicable to the HVIRA because the federal statute simply "does not shield a State's attempt to regulate insurance extraterritorially." 2001 U.S. *Amicus* Br. 28.

This Court reached precisely that conclusion in *Federal Trade Comm'n* v. *Travelers Health Ass'n*, 362 U.S. 293 (1960). Construing Section 2(b) of the Act, 15 U.S.C. § 1012(b), which

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[3] The court of appeals suggested that the U.S. Holocaust Assets Commission Act of 1998, 22 U.S.C. § 1621 note, shows that Congress "encouraged laws like HVIRA." App. *infra*, 50a. But that statute does nothing of the sort. The Act established a *federal* Commission to examine the disposition of Holocaust-era assets in the United States. The Commission issued a report *that makes no mention of state regulation.* As the United States explained (2001 U.S. *En Banc Amicus* Br. 13), the "Act contains no provision suggesting that Congress intended to authorize or endorse a state statute that compels the sort of sweeping extraterritorial disclosure California has required here * * *. In fact, the federal Act points in *the opposite* direction."

provides that specified federal laws "shall be applicable to the business of insurance to the extent that such business is not regulated by state law," the Court held in *Travelers* that the Act does not extend to *extraterritorial* regulation. See 362 U.S. at 299-302. The Court thus found it "clear that [the Act] viewed state regulation of insurance solely in terms of regulation by the law of the State where occurred the activity sought to be regulated. *There was no indication of any thought that a State could regulate activities carried on beyond its own borders.*" *Id.* at 300 (emphasis added).

That rule is dispositive here. The HVIRA has a "vast extraterritorial reach," "impos[ing] regulatory requirements on corporations that have never done business in California with respect to policies issued to foreign nationals who themselves have no connection to California." 2001 U.S. *Amicus* Br. 14, 20. Indeed, the *entire purpose* of the HVIRA is to require the compilation and disclosure of voluminous materials by foreign entities that are not themselves subject to California's jurisdiction and that in many instances have had no contact with the State at all. And the HVIRA does so even though, as the German government has explained, keeping insurance documents private is *required by* German law and unauthorized disclosure is punishable with criminal sanctions. 2001 FRG *En Banc Amicus* Br. 6.

The "practical effect of the regulation is to control conduct beyond the boundaries of the State" (*Healy* v. *Beer Institute*, 491 U.S. 324, 336 (1989)) and to "impose economic sanctions on violators of [California's own] laws with the intent of changing [the affected party's] lawful conduct in other [jurisdictions]." *BMW of North Am., Inc.* v. *Gore*, 517 U.S. 559, 572 (1996). That is the very definition of extraterritorial regulation.

C. The Ninth Circuit's Purported Distinction Of *Travelers* Is Unavailing.

The Ninth Circuit recognized that it could not uphold the HVIRA without distinguishing this Court's decision in *Travelers*. The court of appeals' effort to do so, however, deviates from this Court's unambiguous holding.

The court below reasoned that the limits on state authority to enact extraterritorial insurance regulations recognized in *Travelers* apply only in cases involving Section 2(b) of the Act, and have no bearing on cases concerning Section 2(a), 15 U.S.C. § 1012(a). See App., *infra*, 41a-45a. Section 2(b) provides that specified federal statutes "shall be applicable to the business of insurance to the extent that *such business is not regulated by state law*"; its companion paragraph, Section 2(a), provides that the business of insurance "shall be subject to the laws of the several States *which relate to the regulation * * * of such business*," protecting those state laws from attack under the Commerce Clause. In drawing a sharp distinction between the scope of these two similarly worded provisions, the court of appeals concluded that Congress in the Act (and this Court in *Travelers*) *did not* intend federal statutory law to be displaced by extraterritorial state insurance regulations, but *did* intend to set aside federal Commerce Clause requirements insofar as they apply to those same extraterritorial state regulations

This peculiar reasoning is insupportable. To begin with, as the United States explained below, the plain language of the Act makes no distinction between the body of state laws described by the Act's two subsections. "Paragraphs (a) and (b) [of Section 2 of the Act] are * * * mirror images": the specified federal laws described in Section 2(b) apply to the business of insurance "unless the insurance business at issue is already regulated by the State as contemplated by paragraph (a). There is no apparent basis for the * * * contention that the language of paragraph (b), 'regulated by State law,' means anything other than the 'laws of the * * * States which relate to the regulation * * * of [insurance],' described in paragraph (a)." 2001 U.S. *Amicus* Br. 30. This means, of course, that state laws like those held in *Travelers* to be outside the scope of Section 2(b) because they are extraterritorial also necessarily must be unprotected by Section 2(a).

The central purpose of the McCarran-Ferguson Act confirms that Congress did not intend to authorize, or to insulate from constitutional challenge, extraterritorial state insurance regulations. The Act was passed "in response to this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944)" (*United States Dept. of Treasury* v. *Fabe*, 508 U.S. 491, 499 (1993)), which held for the first time that insurance transactions are subject to the federal commerce power; "[t]here is no question that the primary purpose of the McCarran-Ferguson Act was to preserve state regulation of the activities of insurance companies, as it existed before the *South-Eastern Underwriters* case." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 218 n.18 (1979). See *Fabe*, 508 U.S. at 499; *Travelers*, 362 U.S. at 399. For that reason, Congress made clear that it did not intend the Act "to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the South-Eastern Underwriters Associations case." H.R. Rep. No. 142, 79th Cong., 1st Sess. 3 (1945).

Yet prior to *South-Eastern Underwriters*, this Court had held specifically and repeatedly that states do *not* have authority to regulate or tax the extraterritorial activities of insurance companies. See *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U.S. 77, 81 (1938) (Stone, J.) (State lacks the "power to tax or regulate the corporation's property and activities elsewhere," even where "the corporation enjoys outside the state economic benefits from transactions within it"); *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U.S. 346, 349 (1922) (Holmes, J.) ("It is true that the State may regulate the activities of foreign [insurance] corporations within the State, but it cannot regulate or interfere with what they do outside."); *Allgeyer* v. *Louisiana*, 165 U.S. 578, 591-592 (1897) (State lacks authority to regulate where the insurance "contract [was] made outside the state," "to be performed outside of such jurisdiction"). Indeed, as the Court explained in *Travelers*, the House report on the Act

specifically cited and approved these decisions, declaring that the "'continued regulation and taxation of insurance by the States'" should be

> subject always * * * to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer* v. *Louisiana* (165 U.S. 578), *St. Louis Cotton Compress Co.* v. *Arkansas* (260 U.S. 346), and *Connecticut General Insurance Co.* v. *Johnson* (303 U.S. 77), which hold, inter alia, that a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way.

362 U.S. at 300-301 (quoting H.R. Rep. No. 142, *supra*, at 3).

The decision below cannot be squared with this clear expression of legislative intent. Congress believed that states lacked the authority to engage in extraterritorial insurance regulation, and it left no doubt that the McCarran-Ferguson Act was not intended to expand state authority in that regard.

The Ninth Circuit also attempted to distinguish *Travelers* on the ground that this Court's decision involved state laws that "sought to regulate directly the conduct of an insurer in another jurisdiction," while the HVIRA "seeks only to obtain information about conduct in another jurisdiction." App., *infra*, 41a-43a. But that distinction is chimerical. *Travelers* is expressly premised on Congress's recognition that states lack authority to assert extraterritorial control over insurance companies. That is just what California is attempting to do under the HVIRA: it is requiring foreign insurers to undertake burdensome actions overseas, on the pain of heavy penalties imposed on their California corporate relatives, even if those actions are contrary to foreign criminal law.

The Ninth Circuit reasoned that the HVIRA is protected by McCarran-Ferguson because the state law ostensibly relates to

the California licensing process and "affects foreign commerce only indirectly." App., *infra*, 45a. But under that reasoning, *no* state law ever would be thought to have an extraterritorial effect because states may act directly only on entities within their jurisdiction. Such an approach would read all limits on extraterritorial legislation out of the Act — and out of the Commerce Clause itself.

* * * * *

The Ninth Circuit's decision "reflects a serious misconstruction of governing law on questions of great and immediate importance." 2001 U.S. *En Banc Amicus* Br. 4. The decision authorizes state interference with U.S. foreign policy, undermines the authority of the President to conduct the Nation's foreign relations, invites states to apply their laws extraterritorially, conflicts with decisions of other circuits, and fails to follow this Court's precedents on three important legal questions. Review by this Court is imperative.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2002

APPENDICES

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 01-17023, 01-17433, 02-15282
D.C. No. CV-00-00506-WBS

GERLING GLOBAL REINSURANCE CORP. OF AMERICA; GERLING GLOBAL REINSURANCE CORP. — U.S. BRANCH; GERLING GLOBAL LIFE REINSURANCE COMPANY; GERLING GLOBAL LIFE INSURANCE COMPANY; GERLING AMERICA INSURANCE COMPANY; AND CONSTITUTION INSURANCE CORP., *Plaintiffs-Appellees-Cross-Appellants-Plaintiffs-Appellants,*

v.

Harry W. LOW, in his capacity as the COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA,
Defendant-Appellant-Cross-Appellee-Defendant-Appellee.

D.C. No. CV-00-00875-WBS

ASSICURAZIONI GENERALI,
Plaintiff-Appellee-Cross-Appellant-Plaintiff-Appellant,

v.

Harry W. Low, individually, and in his capacity as the INSURANCE COMMISSIONER FOR THE

STATE OF CALIFORNIA, *Defendant-Appellant-Cross-Appellee-Defendant-Appellee.*

D.C. No. CV-00-00779-WBS

WINTERTHUR INTERNATIONAL AMERICA INSURANCE COMPANY, WINTERTHUR INTERNATIONAL AMERICA UNDERWRITERS INSURANCE COMPANY; GENERAL CASUALTY COMPANY OF WISCONSIN, REGENT INSURANCE COMPANY; REPUBLIC INSURANCE COMPANY; SOUTHERN INSURANCE COMPANY, UNIGARD INDEMNITY COMPANY; UNIGARD INSURANCE COMPANY; AND BLUE RIDGE INSURANCE COMPANY, *Plaintiffs-Appellees-Cross-Appellants-Plaintiffs-Appellants,*

v.

HARRY W. LOW, in his capacity as INSURANCE COMMISSIONER FOR THE STATE OF CALIFORNIA, *Defendant-Appellant-Cross-Appellee-Defendant-Appellee.*

D.C. No. CV-00-00613-WBS

AMERICAN INSURANCE ASSOCIATION AND AMERICAN RE-INSURANCE COMPANY, *Plaintiffs-Appellees-Cross-Appellants-Plaintiffs-Appellants,*

v.

HARRY W. LOW, in his capacity as INSURANCE COMMISSIONER FOR THE STATE OF CALIFORNIA, *Defendant-Appellant-Cross-Appellee-Defendant-Appellee.*

Appeals from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted
May 8, 2002 — Pasadena, California.

Filed July 15, 2002
Amended September 9, 2002

Before: Alfred T. Goodwin, Susan P. Graber, and Richard A. Paez, Circuit Judges

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ORDER

The opinion filed July 15, 2002, is amended as follows:

On slip opinion page 9856, line 3 from the bottom, insert ", denied the Commissioner's summary judgment motion," so the sentence reads as follows: "The court granted Plaintiffs' summary judgment motion, denied the Commissioner's summary judgment motion, and permanently enjoined the Commission from enforcing the statute."

On slip opinion page 9857, second full paragraph, replace the first sentence and citation with: "We review de novo the district court's grant or denial of summary judgment. *United States* v. *Alameda Gateway Ltd.*, 213 F.3d 1161, 1164 (9th Cir. 2000)."

On slip opinion page 9882, last two lines, replace with: "REVERSED and REMANDED with instructions to vacate the injunction and to grant the Commissioner's motion for summary judgment."

The panel has voted to deny the Plaintiffs' petitions for panel rehearing. With the above amendments, the panel has

voted to deny the Defendant's petition for panel rehearing. Judges Graber and Paez have voted to deny the Plaintiffs' petitions for rehearing en banc, and Judge Goodwin has so recommended.

The full court has been advised of the petitions for rehearing en banc and no judge of the court has requested a vote on the petitions.

The Plaintiffs' petitions for panel rehearing and petitions for rehearing en banc are DENIED. With the above amendments, the Defendant's petition for panel rehearing is DENIED.

No subsequent petitions for rehearing or rehearing en banc may be filed.

OPINION

GRABER, Circuit Judge.

This case comes before us for the second time. Plaintiffs, which are various insurance companies and a trade association of insurance companies, brought the present action to enjoin Defendant Harry W. Low, the Insurance Commissioner of the State of California (Commissioner), from enforcing a California statute requiring disclosure of information about Holocaust-era insurance policies. The district court permanently enjoined enforcement of the statute. The main question for decision is this: May California constitutionally require the disclosure of insurance claims-related information by an insurance company that is licensed to do business in California even though the required information may be in the hands of a related entity that is located in a foreign country? We answer that question "yes" and, accordingly, reverse the judgment of the district court and vacate the injunction.

FACTUAL AND PROCEDURAL HISTORY

The Holocaust Victim Insurance Relief Act of 1999, Cal. Ins. Code §§ 13800-13807 (HVIRA), requires any insurer doing business in California that sold insurance policies to persons in Europe that were in effect between the years 1920 and 1945 (Holocaust-era policies) to file certain information about those policies with the Commissioner.[1] Cal. Ins. Code § 13804(a). The reporting requirement also applies to insurance companies that do business in California and are "related" to a company that sold Holocaust-era policies, even if the relationship arose after the policies were issued. *Id.* A "related company" is defined as any "parent, subsidiary, reinsurer,[2] successor in interest, managing general agent, or affiliate company of the insurer." *Id.* § 13802(b). The statute instructs the Commissioner to store the information in a "Holocaust Era Insurance Registry," which is to be made available to the public. *Id.* § 13803. The Commissioner "shall suspend the certificate of authority to conduct insurance business in the state of any insurer that fails to comply" with the reporting requirements, until the insurer complies. *Id.* § 13806.

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[1] The information that the insurance companies must provide is: (1) the number of Holocaust-era insurance policies; (2) the holder, beneficiary, and current status of each policy; and (3) the city of origin, domicile, or address for each policyholder listed in the policies. Cal. Ins. Code § 13804(a)(1)-(3). In addition, the insurer must certify that: (1) the proceeds of the policies were paid; or (2) the beneficiaries or heirs could not, after diligent search, be located, and the proceeds were distributed to Holocaust survivors or charities; or (3) a court of law has certified a plan for the distribution of the proceeds; or (4) the proceeds have not been distributed. The implementing regulations state that, if "the insurer states that it has no actual policies to report because the records are no longer in the possession of the insurer or its related company(ies), it shall provide a complete explanation of that statement." Cal. Code Regs. tit. 10, § 2278.2(a). Any insurer who knowingly files false information is subject to a penalty not to exceed $5,000. Cal. Ins. Code § 13805.

[2] By regulation, the meaning of "reinsurer" is limited to directly related companies. Cal. Code Regs. tit. 10, § 2278.1(i).

Plaintiffs filed four separate actions in which they sought to enjoin the enforcement of HVIRA. The original complaints were filed by

> (1) Gerling Global Reinsurance Corp. of America and its affiliates (collectively, Gerling), who are, according to their complaint, "arguably 'affiliated' [with] . . . or 'related [to]'" two German insurers that issued Holocaust-era policies; (2) American Insurance Association (AIA), a nonprofit trade association of insurers whose member-insurers are required to report under HVIRA, and American Reinsurance Company, a wholly owned subsidiary of a German corporation "that has investment interests in European insurance companies that do issue insurance policies"; (3) Winterthur International America Insurance Company, its affiliates, and numerous other insurance and underwriting companies (collectively, Winterthur), who are "arguably 'related companies' . . . with more than forty insurance companies currently located in Europe"; and (4) Assicurazioni Generali (Generali), an Italian insurance company that issued Holocaust-era policies and currently does business in California.

Gerling Global Reins. Corp. of Am. v. Low, 240 F.3d 739, 742 (9th Cir.2001) (*Gerling I*), *cert. dismissed*, --- U.S. ----, 122 S. Ct. 1907, 151 L.Ed.2d 961 (2002).

Plaintiffs sought declaratory and injunctive relief, claiming that HVIRA violated a number of constitutional provisions. Additionally, Plaintiff Gerling asked the court to review two statutes that were enacted at the same time as HVIRA: (1) California Code of Civil Procedure § 354.5, which allows California residents to bring claims for the payment of Holocaust-era insurance policies and extends the statute of limitations on such claims until December 31, 2010; and (2) California Insurance Code § 790.15, which instructs the Commissioner to suspend the certificate of authority of any insurer who has failed to pay on valid Holocaust-era policies.

The Commissioner, in his motion to dismiss, argued that Gerling did not have standing to challenge these two additional statutes. The district court granted the motion to dismiss the additional challenges because Gerling had not established an imminent threat of prosecution. Gerling did not appeal that ruling. *Gerling I*, 240 F.3d at 742-43.

The district court issued an order granting Plaintiffs' motions for preliminary injunction and enjoined enforcement of HVIRA and its implementing regulations pending the entry of final judgments. The court based its preliminary injunction on a determination that Plaintiffs had established that (1) they probably would succeed under the foreign affairs doctrine and the Commerce Clause, and (2) enforcement of the statute would cause Plaintiffs irreparable harm. The district court did not reach Plaintiffs' other constitutional challenges to the statute.

The Commissioner appealed the district court's decision. We rejected Plaintiffs' Commerce Clause and foreign affairs doctrine challenges to the statute as a matter of law. *Id.* at 743, 751. However, we left the preliminary injunction in place "in order to give the district court an opportunity to consider whether Plaintiffs are likely to succeed on the merits" of their due process claims. *Id.* at 754.

On remand, the district court conducted further proceedings and ultimately held that the statute violates Plaintiffs' right to procedural due process by "mandating license suspension for non-performance of what may be impossible tasks without allowing for a meaningful hearing." *Gerling Global Reins. Corp. of Am. v. Low*, 186 F. Supp.2d 1099, 1113 (E.D. Cal. 2001) (*Gerling II*). The court granted Plaintiffs' summary judgment motion, denied the Commissioner's summary judgment motion, and permanently enjoined the Commissioner from enforcing the statute. *Id.* The Commissioner filed a timely notice of appeal. Plaintiffs timely cross-appealed the district court's denial of their alternative grounds for summary judgment.

Plaintiffs moved for a determination that they were entitled to attorney fees as prevailing parties under 42 U.S.C. §§ 1983, 1988. The district court denied their motion, and Plaintiffs timely appealed that decision as well.

STANDARD OF REVIEW

We review de novo the district court's grant or denial of summary judgment. *United States v. Alameda Gateway Ltd.*, 213 F.3d 1161, 1164 (9th Cir.2000). Viewing the evidence in the light most favorable to the non-moving party, we must determine whether there are any genuine issues of material fact and whether the district court properly applied the relevant substantive law. *Id.* We also review de novo the constitutionality of a statute. *Dittman v. California*, 191 F.3d 1020, 1024-25 (9th Cir.1999).

LEGISLATIVE JURISDICTION

Key to Plaintiffs' position in this appeal is the assertion that the California legislature exceeded its legislative authority and, by doing so, violated Plaintiffs' due process rights. Specifically, Plaintiffs argue that HVIRA regulates extraterritorially, that is, imposes requirements on entities that are located outside California's borders and alters the substance of insurance contracts executed outside the state. We are not persuaded.

We begin from the premise that a state legislature possesses nearly plenary power to regulate state-licensed businesses and to seek information from entities that are licensed to do business within that state. "The wisdom of [a licensing disclosure] requirement is not for us to judge. For in the end, 'it is for the legislature, not the courts, to balance the advantages and disadvantages of . . . new requirement[s].'" *Dittman*, 191 F.3d at 1032 (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-88, 75 S. Ct. 461, 99 L.Ed. 563 (1955)) (second alteration in original). Further, we "will not presume that information sought by state officials for which

there is a legitimate purpose will be put to an unconstitutional use." *Lewis v. Younger*, 653 F.2d 1258, 1260 (9th Cir.1980).

We next emphasize what HVIRA does and does not do. We already have cautioned that Plaintiffs' argument that HVIRA "attempts to regulate the decision making authority of European insurance companies to pay or not to pay claims on European policies . . . mischaracterizes HVIRA as a matter of law." *Gerling I*, 240 F.3d at 745 (internal quotation marks omitted). We have explained that HVIRA is a reporting statute which, "by its terms, does not regulate 'the decision making authority of European insurance companies to pay or not to pay claims on European policies' in any way." *Id.* (internal quotation marks omitted). Further, we have held that the statute "is a California insurance regulation of California insurance companies" that "requires California companies only to *provide information* about Holocaust-era insurance policies that they (or any of their affiliates) issued." *Id.* at 746, 745; *see id.* at 745 (distinguishing HVIRA from "state laws [that] sought to regulate directly the conduct of an insurer in another jurisdiction. By contrast, HVIRA seeks only to obtain information about conduct in another jurisdiction, without affecting directly any of that conduct").

Plaintiffs rely heavily on *Gerling Global Reinsurance Corp. of America v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001), in which the Eleventh Circuit held that a Florida statute similar to HVIRA violated due process because it was enacted in excess of the state's legislative jurisdiction. We find that case uninstructive in analyzing the reach of HVIRA, for two reasons.

First, *Gallagher* is materially distinguishable. In *Gallagher*, information was demanded directly from both local and foreign

entities,[3] while here information is sought only from the California licensees.

Further, the *Gallagher* court held that the sole purpose of the Florida statute was the payment of Holocaust-era claims and that no other justification for the statute, such as the Florida licensees' fitness to do business, had been properly advanced. *Id.* at 1239-40. By contrast, we construe HVIRA to have several legitimate purposes.[4]

Additionally, as we have noted, the only statute at issue in this appeal is a reporting statute. Proposed challenges to other laws that alter the statute of limitations and provide a forum for substantive claims were dismissed for lack of standing. By

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[3] Florida's insurance commissioner issued subpoenas addressed to Florida-licensed insurers and their foreign affiliates, demanding disclosure of a wide range of documents. *Gallagher*, 267 F.3d at 1231.

[4] The Eleventh Circuit acknowledged the importance to its analysis of the Florida statute's purpose:

> We do not mean to say that the Commissioner is necessarily without authority to investigate and obtain records regarding the practices of affiliates of Florida insurers. On the contrary, separate provisions of the Florida Insurance Code may well give the Commissioner authority to conduct far-reaching inquiries into the affairs of a Florida insurer's affiliates in order to determine whether the Florida insurer is fit to do business in the state . . . .
>
> We offer no view as to whether these provisions (which the Commissioner does not even invoke) might have authorized the subpoenas served by the Commissioner in this case; nor do we offer any view regarding the constitutionality of invoking those provisions in this context. Certainly these provisions fit more closely with the purpose now asserted by the Commissioner, and that fact may well affect the Due Process analysis. But the critical point is that these subpoenas were issued in furtherance of an investigation under the Holocaust Victims Insurance Act, and that Act is not concerned with the financial stability or fitness of insurers doing business in Florida . . . .

Gallagher, 267 F.3d at 1240.

contrast, the statute considered in *Gallagher* contained both disclosure and substantive elements. *See id.* at 1229, 1239. Although the Eleventh Circuit based its ruling on only the disclosure provisions, *id.* at 1234, the difference in the structure of the two statutes still is meaningful. The California legislature already made the policy judgment that the reporting requirement is severable and has independent force. Thus we need not guess whether the reporting requirement is merely ancillary to substantive regulations directly affecting out-of-state entities and transactions. *Cf. id.* at 1239 ("[T]he Legislature's inclusion of the claims recovery provisions in the same statute *itself* belies any suggestion that the reporting provisions are really intended to protect ordinary policyholders by monitoring the exposure and financial sufficiency of Florida insurers.").

The second reason why we decline to adopt the reasoning of *Gallagher* is that it offers an interpretation of the legislative jurisdiction doctrine that conflicts with the relevant precedents, at least insofar as a statute like HVIRA is concerned. The legislative jurisdiction cases appear to fall into three different categories, each proscribing a certain type of legislative enactment, and HVIRA falls into none of them. We will discuss these three categories in turn.

A. *Regulation of Out-of-State Entities on the Basis of Incidental In-State Contacts*

Several cases have held that the legislative jurisdiction doctrine bars states from directly regulating out-of-state entities unless those entities and their regulated activities have minimum contacts with the state. The analysis in these cases often parallels the analysis of whether the state would have personal jurisdiction over a party in the context of a judicial proceeding.

Thus, for instance, in *Adventure Communications, Inc. v. Kentucky Registry of Election Finance*, 191 F.3d 429, 432 (4th Cir. 1999), the Fourth Circuit applied the legislative jurisdiction

doctrine to a Kentucky statute regulating out-of-state television and radio broadcasters who sold advertising time to Kentucky gubernatorial candidates. Finding that the requisite minimum contacts existed between the state, the broadcasters, and their campaign- advertising practices, the court held that Kentucky's statute did not violate due process. *Id.* at 437-38.

Similarly, in *American Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County*, 221 F.3d 1211, 1213 (11th Cir.2000) (per curiam), the Eleventh Circuit applied the legislative jurisdiction doctrine to a county ordinance requiring persons, wherever located, who solicited charitable contributions within the county to register with the county before performing services for their clients. The ordinance also placed limitations on the ability of outside solicitors and consultants to raise funds in the county for organizations that had not themselves registered. *Id.* The court, finding that it had insufficient facts with which to perform the "minimum contacts" analysis, remanded the case to the district court for further development of the record. *Id.* at 1215-16.

Finally, in *Quill Corp. v. North Dakota*, 504 U.S. 298, 301-02, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992), the Supreme Court considered the validity of a use tax imposed by North Dakota on out-of-state mail-order vendors who sold goods to North Dakota residents for consumption within the state. The Court found that the requisite minimum contacts existed between the state and the regulated vendors, so that the statute did not exceed North Dakota's legislative jurisdiction. *Id.* at 308, 112 S.Ct. 1904.

As we have explained previously, HVIRA cannot properly be regarded as a statute that directly regulates foreign insurance companies. Although Plaintiffs complain that the practical effect of the statute is to force foreign companies to search through their records and compile the requested information, this characterization ignores a number of relevant facts. HVIRA places no *direct* demands on these foreign entities and does not

impose any sanctions on *them* for noncompliance.[5] Thus, both the demands and the sanctions of the statute fall solely on California insurers. Should the foreign company desire not to help a California affiliate comply with HVIRA, it need not do so. In fact, Plaintiffs themselves highlight this feature of the statute when they argue that they cannot comply due to their lack of "control" over the requested information.

Additionally, California insurers can comply with the statute even in the absence of assistance from foreign affiliates, in at least two ways: The California insurer's employees could travel overseas to examine the documents themselves, or the California insurer could disaffiliate and thus shed any reporting requirement. Either way, foreign insurers would bear no burden resulting from their affiliates' compliance with HVIRA.

In summary, the statutes at issue in *Adventure Communications, American Charities*, and *Quill Corp.* are distinguishable from HVIRA because they directly regulated out-of-state businesses. By contrast, HVIRA directly regulates the behavior of only California insurers.

B. *Regulation of the Substance of Out-of-State Transactions*

A second line of cases addresses the extent to which a state may regulate, and thereby alter, the *substance* of a transaction executed outside the state and having few in-state

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[5] The Gerling and Winterthur Plaintiffs point to letters sent by the California State Treasurer to Plaintiffs' foreign affiliates, urging the companies to help their California affiliates comply with HVIRA. However, these letters were requests, not demands, and carried with them no threat of direct sanctions. Foreign affiliates were and are free to ignore these entreaties. Accordingly, these letters cannot be characterized as a form of direct regulation imposed on foreign insurers.

Moreover, even if these letters were improper, they do not make the statute unconstitutional on its face. HVIRA places no demands directly on foreign insurers; if the Commissioner or other state officials erroneously do so, they do not alter the statute.

consequences. These cases proceed from an analogy based on the "choice-of-law" principle, that is, whether a state has sufficient contacts with the parties and the transaction to apply its substantive law to affect the nature of the transaction. *See, e.g., Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308, 101 S. Ct. 633, 66 L.Ed.2d 521 (1981).

Thus, in *Home Insurance Co. v. Dick*, 281 U.S. 397, 403-04, 50 S.Ct. 338, 74 L.Ed. 926 (1930), the Supreme Court considered whether a Texas insurance statute could apply in the context of litigation over an insurance policy that had been issued in Mexico, by a Mexican insurer, to a Mexican citizen, covering losses occurring in Mexican waters. The statute, had it applied, would have invalidated an essential substantive term in the insurance policy that was legal in Mexico. *Id.* at 404-05, 50 S.Ct. 338; *id.* at 407, 50 S.Ct. 338 ("As construed, it also directs the disregard in Texas of contractual rights and obligations wherever created and assumed; and it commands the enforcement of obligations in excess of those contracted for."). The Court held that the statute, as applied, violated due process because there were insufficient contacts between Texas and the insurance policy that the statute served to alter: "Texas was therefore without power to affect the terms of contracts so made. Its attempt to impose a greater obligation than that agreed upon and to seize property in payment of the imposed obligation violates the guaranty against deprivation of property without due process of law." *Id.* at 408, 50 S.Ct. 338.

Similarly, in *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 67-70, 75 S.Ct. 166, 99 L.Ed. 74 (1954), the Supreme Court applied the legislative jurisdiction doctrine to a Louisiana insurance statute that purported to void certain provisions in insurance contracts entered into outside Louisiana. Likewise, in *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 149, 54 S.Ct. 634, 78 L.Ed. 1178 (1934), the Court refused to enforce a Mississippi statute that altered the terms of an out-of-state contract for a fidelity bond. The Court held:

> The Mississippi statutes, so construed, deprive the appellant of due process of law. A state may limit or prohibit the making of certain contracts within its own territory; but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made. Nor may it in an action based upon such a contract enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen.
>
> . . . A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment.

Id. at 149-50, 54 S.Ct. 634 (citations omitted).

More recently, in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 799, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985), the Supreme Court examined whether a Kansas court could apply Kansas law to a class action involving plaintiffs from all 50 states who were seeking to recover royalty payments with respect to lands leased by Phillips Petroleum in 11 states. Highlighting the substantive differences between the laws of Kansas and the laws of the states where the lands were leased, the Court held that Kansas lacked sufficient contacts with the out-of-state transactions to apply Kansas law. *Id.* at 816-17, 821, 105 S.Ct. 2965.

HVIRA's reporting provisions do not seek to regulate the substance of out-of-state transactions. The statute does not require insurers to pay any claims or otherwise alter the terms

of Holocaust-era insurance policies.[6] To the contrary, HVIRA requires California insurers *only to disclose information about* their foreign transactions or those of their affiliates. A request for information is simply not equivalent to a direct regulation of out-of-state transactions. Thus, cases such as *Hague, Dick, Watson, Hartford,* and *Phillips* are inapposite because HVIRA does not change the terms or enforceability of the insurance policies issued by Plaintiffs or their foreign affiliates.

Plaintiffs counter by asserting that the express purpose of HVIRA is to force California-licensed insurers and their foreign affiliates to pay any outstanding Holocaust-era claims long after the statute of limitations for such claims has run. However, this assertion ignores the fact that the statute has several other purposes as well. As we said in our previous opinion, it "also is likely that California's legislature simply intended to protect its residents from insurance companies that have not paid valid insurance claims." *Gerling I*, 240 F.3d at 745. Further, the Commissioner has propounded other legitimate purposes for the statute, such as informing California residents about potentially valid claims and about the character of the family of companies with whom they might contract for insurance.

Plaintiffs point to two other California statutes that, they contend, *do* seek to regulate the substance of foreign transactions. California Code of Civil Procedure § 354.5 allows California residents to bring claims for the payment of Holocaust-era insurance policies and extends the statute of limitations on such claims until December 31, 2010. California Insurance Code § 790.15 requires the Commissioner to suspend

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[6] Plaintiffs contend that HVIRA's definition of "proceeds," Cal. Ins. Code § 13802(c), rewrites the terms of the foreign insurance policies because the parties to the insurance contracts never contemplated or bargained for such a definition. However, this definition of "proceeds" is *for reporting purposes only* and does not alter the substantive terms of, or obligations arising under, any insurance policy.

the certificate of authority of any insurer who has failed to pay claims on valid Holocaust-era policies. It may well be that these statutes were enacted in excess of California's legislative jurisdiction. However, we reiterate that these separately enacted provisions are not before us.[7] Because HVIRA does not change any obligation of any party to a foreign insurance contract, it is distinguishable from the precedents examined in this section.

C. *Taxation of In-State Entities Arising From Transactions Conducted Entirely Out-of-State*

In the third category of precedents on which Plaintiffs rely, the Supreme Court has applied a due process analysis to state statutes taxing out- of-state insurance transactions. Under these cases, a statute may exceed a state's legislative jurisdiction if it taxes a foreign insurer disproportionately to its activities in the taxing state, even if the taxing statute does not change the substantive terms of any foreign insurance policy.

In *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77, 79, 58 S.Ct. 436, 82 L.Ed. 673 (1938), the Supreme Court invalidated a California statute taxing California-licensed insurers' receipt of premiums on reinsurance held by other California insurers. The reinsurance contracts that the state sought to tax were executed in Connecticut, where the premiums were paid and the losses, if any, were payable. *Id.* The Court found that California did not have a sufficient connection to the insurance policies to tax them because "[n]o act in the course of their formation, performance or discharge, took place" in the state. *Id.* at 81, 58 S.Ct. 436. Accordingly, the Court held that the statute violated due process: "The tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state." *Id.* at 82, 58 S.Ct. 436.

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[7] In *Gerling I*, the district court held that Plaintiffs did not have standing to challenge these provisions, and Plaintiffs did not appeal this aspect of the court's decision. 240 F.3d at 742-43.

Similarly, in *American Oil Co. v. Neill*, 380 U.S. 451, 452, 85 S.Ct. 1130, 14 L.Ed.2d 1 (1965), the Court employed a due process analysis to invalidate an Idaho tax on a state-licensed dealer in motor fuels that had sold a large amount of fuel through a series of out-of-state transactions. The Court held that the state could not constitutionally tax the extraterritorial sales because they were insufficiently related to the dealer's activities within Idaho. *Id.* at 457-58, 85 S.Ct. 1130. The Court reaffirmed the principle that "there must be some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Id.* at 458, 85 S.Ct. 1130 (citation and internal quotation marks omitted).

Plaintiffs argue that *Connecticut General* and *Neill* are indistinguishable from the case before us. They note that HVIRA requires California insurers to expend resources in order to disclose information about transactions that were entered into and performed (or not performed) entirely outside the state. Thus, they argue that HVIRA, like the statutory provisions analyzed in *Connecticut General* and *Neill*, imposes financial consequences on in-state insurance companies based on those companies' out-of-state activities.[8]

HVIRA is distinguishable from the statutes analyzed in *Connecticut General* and *Neill* because the only regulation that

[8] Notwithstanding the Commissioner's argument to the contrary, later decisions of the Supreme Court have not eviscerated *Connecticut General* and *Neill*. Cases such as *ASARCO Inc. v. Idaho State Tax Commission*, 458 U.S. 307, 102 S.Ct. 3103, 73 L.Ed.2d 787 (1982), and *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768, 112 S.Ct. 2251, 119 L.Ed.2d 533 (1992), can be read as requiring the taxing state to have minimum contacts with the transaction to be taxed. *ASARCO*, 458 U.S. at 315, 327-29, 102 S.Ct. 3103 (citing *Connecticut General*); *Allied Signal*, 504 U.S. at 778, 112 S.Ct. 2251 ("Although our modern due process jurisprudence rejects a rigid, formalistic definition of minimum connection, we have not abandoned the requirement that, in the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax.").

it imposes on Plaintiffs is a duty to disclose information, rather than to pay money to the regulating state. A state's taxing the extraterritorial transactions of in-state insurance companies (thus gaining financially from a multi-jurisdictional entity's revenues) and a state's asking for information about those same transactions are qualitatively different requirements. The former is a form of direct regulation of the out-of-state transaction, and collects money on behalf of the state itself, while the latter is simply a means for the state to assure the corporate good character and financial viability of companies doing business within the state. Plaintiffs' argument proves too much, because nearly every regulatory, record-keeping, and reporting statute requires a regulated entity doing business in more than one jurisdiction to expend resources to comply. Thus, we draw a bright line between obtaining information and obtaining tax revenues, just as we drew a bright line between obtaining information and substantively regulating the topics contained in the informational reports.[9]

D. *Conclusion*

Were we to hold that a state may require companies operating within the state to *report* on only those out-of-state activities with which the state can claim minimum contacts, our

[9] We also question the force of authorities such as *Connecticut General* and *Neill* outside the context of taxation. We already have acknowledged that cases defining the outer limits of a state's power to tax are not always readily transferable to other contexts. *See, e.g., Atonio v. Wards Cove Packing Co.*, 10 F.3d 1485, 1495 n.8 (9th Cir.1993) (finding inapplicable "the line of cases . . . in which the Supreme Court has struck down discriminatory state tax provisions for lack of a rational basis" because "state tax cases may genuinely be viewed as *sui generis*; it is an area where the Supreme Court has remained active long after ceasing to invalidate other economic legislation on equal protection grounds").

logic would invalidate many existing reporting statutes.[10] State statutes and regulations routinely require multinational insurance companies, banks, and the like to disclose foreign activities and transactions engaged in by them and their parent and affiliate companies. Under Plaintiffs' strict conception of the legislative jurisdiction doctrine, states would be prohibited from requesting information about potentially fraudulent conduct committed by a local company's European parent simply because the "subject matter" of that conduct was a foreign transaction among foreign nationals. The Supreme Court cases do not contemplate the use of the legislative jurisdiction doctrine to eviscerate state regulatory power so completely.

In conclusion, the legislative jurisdiction analysis is inapplicable to HVIRA, because it does nothing more than seek information from California-licensed insurers. Therefore, the Commissioner need not prove that minimum contacts exist between California, Plaintiffs' foreign affiliates, and the Holocaust-era policies issued by them. Instead, the state's power to enact and enforce HVIRA is bounded only by other constitutional protections. It is to an analysis of these other protections that we now turn.

SUBSTANTIVE AND PROCEDURAL DUE PROCESS

The district court held that HVIRA violates procedural due process by "mandating license suspension for non-performance of what may be impossible tasks without allowing for a meaningful hearing." *Gerling II*, 186 F. Supp.2d at 1113. In the district court's view, the statute is unconstitutional because it does not allow a hearings officer to consider any excuse for

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[10] Examples of statutes that could be constitutionally problematic under Plaintiffs' proposed analysis include: California Insurance Code § 699.5 (foreign subsidies); *id.* § 717 (qualifications for certificate of authority); *id.* §§ 1215-1215.16 (Insurance Holding Company System Regulatory Act); California Financial Code §§ 5800-5811 (savings and loan holding companies); *id.* §§ 10000-10009 (foreign savings companies).

noncompliance, even when an insurer can prove that it lacks control over the information requested or that disclosure of the information would violate foreign law. *Id.* at 1111. This aspect of the district court's decision is legally flawed because it conflates the analytically distinct concepts of procedural and substantive due process.

Regulated parties generally have a right to a meaningful hearing only with respect to those defenses actually allowed under a given statute. Thus, if a particular defense is deemed irrelevant under the statute, a party has no *procedural* due process right to a hearing with respect to that defense. Instead, the party's only avenue of recourse is to declare that it has a right to present its chosen defense as a matter of *substantive* due process. *See, e.g.*, *Burlington N.R.R. v. Dep't of Pub. Serv. Regulation*, 763 F.2d 1106, 1113 (9th Cir.1985) ("If the statute is constitutional, the lack of a hearing does not make it unconstitutional. A state does not violate due process by making a legislative determination rather than a particularized inquiry if the subject of the legislation does not interfere with the exercise of fundamental rights."); see also *Bell v. Burson*, 402 U.S. 535, 541, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971) ("The main thrust of Georgia's argument is that it need not provide a hearing on liability because fault and liability are irrelevant to the statutory scheme. We may assume that were this so, the prior administrative hearing presently provided by the State would be appropriate to the nature of the case." (citation and internal quotation marks omitted)).

Accordingly, the district court erred by not engaging in a two-step inquiry to determine, first, whether Plaintiffs were constitutionally entitled to raise foreign-affiliate and foreign-law defenses to HVIRA and, second, whether the statute provides Plaintiffs with the requisite level of process with respect to the defenses allowed under the statute. We will consider each aspect of this two-part analysis.

A. *Substantive Due Process and the Proposed Defenses*

Plaintiffs argue that, as a matter of substantive due process, they must be entitled to raise defenses premised on their lack of control over the required information or the illegality under foreign law of their disclosure of the information.[11] We are not persuaded.

Because HVIRA neither employs a suspect classification nor infringes on a fundamental right, the applicable standard of review is the rational basis test. *See Richardson v. City of Honolulu*, 124 F.3d 1150, 1162 (9th Cir.1997) ("We will strike down a statute on substantive due process grounds if it is arbitrary and irrational."); *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 66 (9th Cir.1994) ("When reviewing the substance of legislation or governmental action that does not impinge on fundamental rights, . . . we do not require that the government's action actually advance its stated purposes, but merely look to see whether the government *could* have had a legitimate reason for acting as it did."). Accordingly, the proper standard by which to measure HVIRA's license-revocation provisions is whether they bear "a rational relationship to a legitimate state interest." *Burlington N.*, 763 F.2d at 1109.

The Commissioner justifies the statute in several ways. First, the statute expressly states that its purpose is to provide California residents with information that facilitates their resolution of legitimate claims, if any, against private insurance companies through an international process or otherwise. Cal.

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[11] HVIRA *does* incorporate a "literal impossibility" defense. That is, if a company's Holocaust-era records no longer exist, the statute does not require their disclosure. Cal.Code Regs. tit. 10, § 2278.2(a); *Gerling II*, 186 F. Supp.2d at 1105. The Commissioner also represents in his briefs that "[s]uspension could also be avoided if the information exists but is not in the possession, custody or control of the licensee or any of its related companies (*e.g.*, if the information is in the possession of an unrelated company or is only located in a government archive)."

Ins. Code § 13801.[12] Second, as we have acknowledged, California's legislature could have intended the statute to provide a means of protecting state residents from insurance companies that have not paid valid claims. *Gerling I*, 240 F.3d at 745. Third, the state has a legitimate interest in providing information to its citizens about the character of the family of insurance companies from which they are contemplating buying insurance.

Plaintiffs counter that the sole express *and* implicit purpose of the law is to force California-licensed insurers and their foreign affiliates to pay Holocaust-era claims. They ask us to reject the Commissioner's assertion of alternative purposes. Although subjectively the legislature's main purpose was to facilitate payment of Holocaust-era claims, we read the legislature's declared purposes to be somewhat broader than that. *See* Cal. Ins. Code § 13801(c), (e) (stating in part that insurers may be the sole source of information about Holocaust-era policies and that insurers have a responsibility to disclose that information to the state).

More importantly, however, the legislature's subjective or declared purpose is irrelevant in the context of rational basis review. A statute must be upheld under the rational basis analysis if it can be justified by *any* legitimate purpose, even one on which the government did not rely in enacting the statute, and even if the statute does a poor job of advancing the intended aims. *Dittman*, 191 F.3d at 1031 ("[W]e do not require that the government's action actually advance its stated purposes, but merely look to see whether the government *could* have had a legitimate reason for acting as it did." (citation and internal quotation marks omitted)); *Richardson*, 124 F.3d at

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[12] Helping California residents recover on valid insurance claims is a legitimate governmental purpose. The record shows that many Holocaust survivors are poor; to the extent that information can facilitate their recovery of insurance (through the means that Plaintiffs themselves recognize as valid, or otherwise), it will ease the burden on the state's fisc.

1162 ("In a substantive due process challenge, we do not require that the City's legislative acts actually advance its stated purposes . . . ." (citation and internal quotation marks omitted)).

Faced with precedent suggesting that the California legislature's actual subjective or declared purpose in enacting the statute is irrelevant, Plaintiffs next argue that HVIRA's reporting requirements are not rationally related to any of the asserted purposes of the statute. They argue that the significance of the information requested under HVIRA cannot be analyzed meaningfully without considering whether Plaintiffs' affiliates were legally obligated to pay policyholders under foreign law. Similarly, they contend that, if the statute were directed at the integrity of California licensees, it would seek information not only on foreign affiliates' payment of Holocaust-related claims in Europe between 1920 and 1945, but also on all other aspects of the affiliates' claims-handling history. Further, they argue that there is no evidence of a relationship between Plaintiffs' current claims-handling practices in California and the claims-handling practices of their foreign affiliates in Europe dating back more than half a century ago. In other words, they argue that HVIRA is over-inclusive in some respects and under-inclusive in others.

But, under the rational basis test, California need not demonstrate that the statute will *actually* serve the articulated purposes. Instead, the statute is constitutional if the legislature rationally could have *believed* that HVIRA would promote a legitimate objective. *Dittman*, 191 F.3d at 1032; *Burlington N.*, 763 F.2d at 1110. Further, a statute need not be a comprehensive response to a given problem to be rationally related to a legitimate governmental interest. Instead, legislation may proceed " 'one step at a time' " and still satisfy the rational basis test. *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1052-53 (9th Cir.2000) (quoting *Williamson*, 348 U.S. at 489, 75 S. Ct. 461), *cert. denied*, 532 U.S. 972, 121 S. Ct. 1602, 149 L.Ed.2d 469 (2001). The Holocaust is unique, and California's

decision to proceed first with respect to these particular claims is both understandable and permissible. Finally, it is not only the claims-handling practices of 50 years ago that are at issue, but also the current and continuing failure of California-licensed insurers and their foreign affiliates to disclose information about any outstanding potentially valid claims.

Having thus established that, in general, HVIRA is constitutional under the rational basis test, we next must address whether the statute's failure to provide for foreign-affiliate and foreign-law defenses is *also* rationally related to legitimate governmental interests. We conclude that, even assuming that the California licensees do not have control of information in the hands of their foreign affiliates and that disclosure pursuant to HVIRA violates European data protection laws, those facts do not make the statute unconstitutional because it was rational for the legislature to require disclosure as a condition to holding an insurance license in California. We agree with the Commissioner that the suggested defenses would hamper the state's ability to provide information to Holocaust victims and their families about potentially valid claims, to protect California citizens from insurance companies that have a history of refusing to pay valid claims or of refusing to inform potential beneficiaries about policy proceeds to which they may be entitled, and to inform California citizens about the character of the family of insurance companies from which they are contemplating buying insurance. California is entitled to condition the privilege of doing business in the state on the disclosure of information in which California has a legitimate interest.

Were a defense based on lack of control over requested information a requirement of substantive due process, an insurer could evade *any* kind of state disclosure statute or regulation simply by transferring all relevant documents to an affiliate over which it lacks direct control. Similarly, were a defense premised on foreign law required by due process, state

regulatory efforts could be hindered by foreign statutes enacted for the purpose of shielding foreign corporations from routine reporting requirements.

Plaintiffs respond that, public policy notwithstanding, substantive due process requires that they be allowed to raise these defenses. They rely heavily on *Societe Internationale Pour Participations Industrielles et Comerciales, S.A. v. Rogers*, 357 U.S. 197, 78 S. Ct. 1087, 2 L.Ed.2d 1255 (1958); *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 782- 83 & n. 8 (9th Cir.1983); and *In re United States v. Sumitomo Marine & Fire Insurance Co.*, 617 F.2d 1365, 1369 (9th Cir.1980).

However, those cases are easily distinguishable. *Societe Internationale* concerned only "whether Fifth Amendment due process is violated by the striking of a complaint because of a plaintiff's inability, despite good-faith efforts, to comply with a pretrial production order." 357 U.S. at 210, 78 S. Ct. 1087. The Supreme Court made a point to limit its decision to the context of discovery sanctions:[13] "We do not say that this ruling would apply to every situation where a party is restricted by law from producing documents over which it is otherwise shown to have control." *Id.* at 205-06, 78 S. Ct. 1087. In *Sumitomo*, this court *affirmed* a discovery sanction tantamount

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[13] Courts discussing *Societe Internationale* have interpreted the reach of its due process holding narrowly even in the context of discovery sanctions. *See, e.g., Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1474 (9th Cir.1992) ("Cases since *Societe Internationale*, however, have emphasized that a foreign-law prohibition will not always excuse compliance with a discovery order."); *United States v. Vetco, Inc.*, 691 F.2d 1281, 1287 (9th Cir.1981) ("*Societe Internationale* did not erect an absolute bar to summons enforcement and contempt sanctions whenever compliance is prohibited by foreign law."); *United States v. Bank of Nova Scotia (In re Grand Jury Proceedings)*, 691 F.2d 1384, 1388 (11th Cir.1982) ("[T]he Supreme Court did not erect an absolute bar to sanctions being imposed for noncompliance with summons or subpoenas whenever compliance is prohibited by foreign law.").

to dismissal even though the government-plaintiff was unable to comply with the district court's discovery orders due to "serious understaffing" rather than bad faith. 617 F.2d at 1369-70. Finally, *Falstaff* dealt with sanctions arising in the context of criminal contempt, where willful disobedience of a court order must be proved beyond a reasonable doubt. 702 F.2d at 782. We have found no decision holding that privacy protections under foreign law, or lack of control over information, excuses compliance with disclosure obligations required as a condition for obtaining or retaining a business license.

By contrast, other persuasive precedents support the proposition that a statute may be constitutional yet at the same time make no allowance for an "impossibility" defense. *See, e.g., Danfield v. Johns Manville Sales Corp. (In re Asbestos Litigation)*, 829 F.2d 1233, 1235, 1244 (3d Cir. 1987) (upholding the constitutionality of state law prohibiting defendants from raising an impossibility defense to tort claims); *United States v. City of Hoboken*, 675 F.Supp. 189, 197-98 (D.N.J. 1987) (rejecting the defendant's substantive due process argument "that constitutional principles of fundamental fairness mandate an impossibility defense" to the Clean Water Act); *cf. Hawkins v. Agric. Mktg. Serv.*, 10 F.3d 1125, 1134 (5th Cir. 1993) (holding that a statute did not violate due process even though it mandated revocation of the plaintiff's license in response to behavior in which the plaintiff took no part, and despite the fact that the plaintiff had no opportunity to demonstrate his innocence).

Because a defense based on lack of control over records or on the conflicting demands of foreign law would thwart the legitimate regulatory purposes of HVIRA, we find no violation of substantive due process.

B. *Procedural Due Process Under HVIRA*

Plaintiffs argue that HVIRA is unconstitutional on its face because it makes no provision for a hearing prior to revocation

of an insurance company's license. The statute provides that "[t]he Commissioner *shall* suspend the certificate of authority to conduct insurance business in the state of any insurer that fails to comply with [HVIRA]." Cal. Ins. Code § 13806 (emphasis added). However, because the statute must be, and in fact is, interpreted to require such a hearing, HVIRA does not violate procedural due process on its face.

Plaintiffs' licenses to do business in California are protected property interests. *See Bell*, 402 U.S. at 539, 91 S. Ct. 1586 ("Once licenses are issued, . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment."). The state may not revoke a protected property interest without first providing a meaningful hearing. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Bell*, 402 U.S. at 541-42, 91 S.Ct. 1586.

Because HVIRA does not expressly provide for such a hearing, Plaintiffs assert that it is facially unconstitutional. What this argument fails to recognize is that, under California law, such a hearing must be implied into the statute. The state's administrative procedure act requires the provision of those procedures that are required by the federal or state constitutions. Cal. Gov't Code § 11410.10. Further, the California Supreme Court has established a presumption that hearing requirements should be inferred in a statute like HVIRA "unless the statute expressly provides to the contrary." *Fascination, Inc. v. Hoover*, 39 Cal.2d 260, 246 P.2d 656, 662 (1952).

Thus, when read in the context of other state law, HVIRA requires the Commissioner to hold a hearing before revoking the license of an allegedly noncomplying insurance company. He concedes that this is so. As properly and as actually

interpreted, therefore, the statute is not facially unconstitutional for failure expressly to provide for a hearing.

OTHER CONSTITUTIONAL CLAIMS

In addition to making due process arguments, Plaintiffs claim that HVIRA violates the foreign affairs power of the United States, the Commerce Clause, the Bill of Attainder Clause, the Equal Protection Clause, the Fourth Amendment, and the Contract Clause. None of these arguments provides a persuasive alternative justification for affirming the district court's decision.

A. *Foreign Affairs Power and Commerce Clause*

In response to Plaintiffs' challenges based on the foreign affairs power and the Commerce Clause, we already have held that HVIRA is *facially* constitutional. *Gerling I*, 240 F.3d at 751, 743. We are not persuaded that we erred.

Plaintiffs now argue that, *as applied*, HVIRA runs afoul of these constitutional provisions.[14] As discussed above, California has urged foreign insurers to help their state-licensed affiliates comply with HVIRA, but it has not sought to regulate these foreign insurers directly. That being so, the record contains insufficient evidence to demonstrate that the statute, as applied to Plaintiffs, is unconstitutional under the foreign affairs power or the Commerce Clause.

B. *Bill of Attainder Clause*

Next, Plaintiffs argue that HVIRA constitutes a bill of attainder because the statute seeks to punish a specific person or group of persons for past conduct without a judicial trial. *See* U.S. Const. art. I, § 10, cl. 1. We disagree.

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[14] As Plaintiffs Assicurazioni Generali, American Insurance Association, and American Reinsurance Company candidly admit, "[i]nsurers ask the Court to *reconsider* its holdings on their foreign affairs power and Foreign Commerce Clause claims." (Emphasis added.)

"Three requirements must be met to establish a violation of the bill of attainder clause: '[S]pecification of the affected persons, punishment, and lack of a judicial trial.'" *United States v. Munsterman*, 177 F.3d 1139, 1141 (9th Cir.1999) (quoting *Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 847, 104 S.Ct. 3348, 82 L.Ed.2d 632 (1984)). Assuming — without deciding — that HVIRA meets the first and third elements, it fails to meet the second.

We consider three factors when determining whether "a statute inflicts punishment that implicates the Bill of Attainder Clause." *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723, 728 (9th Cir.1992). We ask "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a[n] . . . intent to punish.'" *Id.* (quoting *Selective Serv. Sys.*, 468 U.S. at 852, 104 S. Ct. 3348).

First, the statute does not fall within the historical meaning of legislative punishment. The ultimate sanction available to the Commissioner, suspension of an insurer's license to do business, may be such a punishment. *See Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 474-75, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977) (noting that legislative punishment includes "barring designated individuals or groups from participation in specified employments or vocations"); *Selective Serv. Sys.*, 468 U.S. at 852, 104 S.Ct. 3348 ("[T]he list of punishments forbidden by the Bill of Attainder Clause has expanded to include legislative bars to participation by individuals or groups in specific employments or professions."). Even if it is, however, suspension can occur only after a California insurer fails to comply with the statutory demand for information; that is, the statute imposes a sanction on the basis of an insurer's future conduct. Generally, a statute that leaves open the possibility of compliance, and thus avoidance of punishment,

does not fall within the historical meaning of legislative punishment. *See id.* at 853, 104 S.Ct. 3348 (upholding a statute denying educational funding to students who failed to register for the draft, in part because the statute allowed students to qualify for aid after properly registering).

Second, as discussed above, HVIRA furthers nonpunitive legislative purposes: providing data to Holocaust victims and their families about potentially valid claims, protecting California citizens from insurance companies that have a history of refusing claims or refusing to disclose information, and telling California citizens about the character of the family of insurance companies from which they are contemplating buying insurance.

Third, the legislative record does not evince an intent to punish foreign insurance companies or their California-licensed affiliates. As even Plaintiffs concede, the text of the statute and its legislative history demonstrate that the statute was subjectively intended as a means of facilitating payment of Holocaust-era policies.[15] Being asked to account for potentially valid insurance claims is not punishment, even if it proves embarrassing to some insurers. Nowhere in the statute's history does the California legislature express a desire to "punish" California insurers or their foreign affiliates. Because HVIRA is not a "punishment," it is not an unconstitutional bill of attainder.

C. *Contract Clause*

Plaintiffs assert that HVIRA violates the Contract Clause by attempting to modify the express terms of European insurance policies. *See* U.S. Const. art. I, § 10, cl. 1. By doing so, they argue, HVIRA would substantially impair the rights and responsibilities of parties to private contracts entered into

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[15] The other legitimate purposes that we have discussed above, to the extent that they are reflected in the legislative record, likewise involve no intent to punish insurers.

decades ago and having no relation to California. As we have explained, this argument mischaracterizes the nature of the statute and the relevance of its definition of the term "proceeds." HVIRA, as distinct from other California statutes whose constitutionality is *not* at issue here, does not compel payment of any Holocaust-era claim and does not alter the substance of any insurance contract. Accordingly, HVIRA does not violate the Contract Clause.

D. *Equal Protection Clause*

Plaintiffs argue that HVIRA violates equal protection. However, Plaintiffs do not assert that the statute treats them differently as a result of their membership in a protected class. Instead, they claim only that HVIRA imposes weightier reporting burdens on insurance companies that either directly or through related entities sold insurance policies in Europe from 1920 to 1945. In the circumstances, we evaluate the equal protection challenge under the rational basis test. *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 668, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981).

In this context, Plaintiffs again urge that the Commissioner can articulate no rational basis sufficient to justify the statute. However, for the reasons discussed above, we disagree. Consequently, the insurers have not demonstrated that HVIRA violates equal protection.

E. *Fourth Amendment*

Finally, Plaintiffs argue that HVIRA violates the Fourth Amendment. Like the equal protection argument, however, this claim is simply a rearticulation of another argument: Because HVIRA purportedly exceeds California's legislative jurisdiction, its investigation into the affairs of European insurance companies is an unconstitutional search. According to Plaintiffs, an investigation exceeds the scope of a governmental agency's investigatory power if it is one that the demanding agency is not authorized to make. They cite in

support of this proposition *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208, 66 S.Ct. 494, 90 L.Ed. 614 (1946).

We have no quarrel with the general proposition. But HVIRA does not empower the Commissioner to make disclosure requests that exceed his constitutional authority. Therefore, the statute does not violate the Fourth Amendment in the manner argued.

ATTORNEY FEES

Plaintiffs assert that the district court abused its discretion by denying their motion for attorney fees. Because the district court improperly concluded that HVIRA was unconstitutional, it also erred in concluding that Plaintiffs were "prevailing parties" for the purposes of 42 U.S.C. § 1988. They are not entitled to fees.

CONCLUSION

HVIRA is not unconstitutional in any of the particulars argued by Plaintiffs. The district court erred in concluding otherwise.

REVERSED and REMANDED with instructions to vacate the injunction and to grant the Commissioner's motion for summary judgment.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-16163
D.C. No. CV-00-00506-WBS

GERLING GLOBAL REINSURANCE CORP. OF AMERICA; GERLING GLOBAL REINSURANCE CORP. — U.S. BRANCH; GERLING GLOBAL LIFE REINSURANCE COMPANY; GERLING GLOBAL LIFE INSURANCE COMPANY; GERLING AMERICA; INSURANCE COMPANY; and CONSTITUTION INSURANCE CORP., *Plaintiffs-Appellees,*

v.

HARRY W. LOW,* in his capacity as the COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA, *Defendant-Appellant.*

No. 00-16164
D.C. No. CV-00-00875-WBS

ASSICURAZIONI GENERALI, *Plaintiff-Appellee,*

v.

HARRY W. LOW, individually, and in his capacity as the INSURANCE COMMISSIONER for the STATE OF CALIFORNIA, *Defendant-Appellant.*

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* Harry W. Low is substituted for his predecessor as Commissioner of Insurance for the State of California. Fed. R. App. P. 43(c)(2).

No. 00-16165
D.C. No. CV-00-00779-WBS

WINTERTHUR INTERNATIONAL AMERICA INSURANCE COMPANY; WINTERTHUR INTERNATIONAL AMERICA UNDERWRITERS INSURANCE COMPANY; GENERAL CASUALTY COMPANY OF WISCONSIN; REGENT INSURANCE COMPANY; REPUBLIC INSURANCE COMPANY; SOUTHERN INSURANCE COMPANY; UNIGARD INDEMNITY COMPANY; UNIGARD INSURANCE COMPANY; and BLUE RIDGE INSURANCE COMPANY, *Plaintiffs-Appellees,*

v.

HARRY W. LOW, in his capacity as INSURANCE COMMISSIONER for the STATE OF CALIFORNIA, *Defendant-Appellant.*

No. 00-16182
D.C. No. CV-00-00613-WBS

AMERICAN INSURANCE ASSOCIATION and AMERICAN RE-INSURANCE COMPANY, *Plaintiffs-Appellees,*

v.

HARRY W. LOW, in his capacity as INSURANCE COMMISSIONER for the STATE OF CALIFORNIA, *Defendant-Appellant.*

Appeals from the United States District Court
for the Eastern District of California,
William B. Shubb, District Judge, Presiding.

Argued and Submitted:
January 9, 2001 — San Francisco, California.
Filed: February 7, 2001

Before: Alfred T. Goodwin, Susan P. Graber, and
Richard A. Paez, Circuit Judges

OPINION

GRABER, Circuit Judge:

Plaintiffs are three insurance companies and one trade organization of insurance companies who do business in California. They sued the California Commissioner of Insurance (Commissioner) seeking declaratory and injunctive relief to bar enforcement of the Holocaust Victim Insurance Relief Act of 1999 (HVIRA), Cal. Ins. Code §§ 13800-13807 (1999). The district court issued a preliminary injunction after ruling that Plaintiffs had established a likelihood of irreparable harm and a probability of success on the merits of the questions whether HVIRA violates the Commerce Clause and whether it violates the federal government's "foreign affairs" power. The Commissioner brings this appeal. We leave the preliminary injunction in place, but for reasons different than those expressed by the district court.

FACTUAL AND PROCEDURAL HISTORY

HVIRA requires insurers that do business in California and that sold insurance policies, in effect between 1920 and 1945 (Holocaust-era policies), to persons in Europe to file certain information about those policies with the Commissioner.[1] Cal.

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[1] The information that the insurance companies must provide is: (1) the number of insurance policies; (2) the holder, beneficiary, and current status of each policy; and (3) the city of origin, domicile, or address for each policyholder listed in each policy. Cal. Ins. Code § 13804(a)(1)-(3). In addition, the insurer must certify that: (1) the proceeds of the policies were paid; or (2) the beneficiaries or heirs could not be located after diligent search, and the proceeds were distributed to Holocaust survivors or charities; or (3) a court of law has certified a plan for distributing the proceeds; or (4) the proceeds have not been distributed. *Id.* § 13804(b)(1)-(3). The implementing regulations state that, if "the insurer states that it has no actual policies to report because the records are no longer in the possession of the insurer or its related company(ies), it shall provide a complete explanation of that statement." Cal. Code Regs. tit. 10, § 2278.2(a) (2000). Any insurer who knowingly files false information is subject to a penalty of up to $5,000. Cal. Ins. Code § 13805.

Ins. Code § 13804(a). The reporting requirement also applies to insurance companies that do business in California and are "related" to a company that sold Holocaust-era policies, even if the relationship arose after the policies were issued. *Id.* A "related company" is any "parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer." *Id.* § 13802(b). HVIRA requires the Commissioner to store the information in a public "Holocaust Era Insurance Registry." *Id.* § 13803. The Commissioner must "suspend the certificate of authority to conduct insurance business in the state of any insurer that fails to comply" with HVIRA's reporting requirements. *Id.* § 13806.

Plaintiffs filed four separate actions against the Commissioner, in which they sought to enjoin enforcement of HVIRA. The actions were brought by: (1) Gerling Global Reinsurance Corp. of America and its affiliates (collectively, Gerling), who are, according to their complaint, "arguably 'affiliated' [with] . . . or 'related to'" two German insurers that issued Holocaust-era policies; (2) American Insurance Association (AIA), a nonprofit trade association of insurers whose member-insurers are required to report under HVIRA, and American Re-insurance Company, a wholly owned subsidiary of a German corporation "that has investment interests in European insurance companies that do issue insurance policies"; (3) Winterthur International America

Insurance Company, its affiliates, and numerous other insurance and underwriting companies (collectively, Winterthur), who are "arguably 'related companies' . . . with more than forty insurance companies currently located in Europe"; and (4) Assicurazioni Generali (Generali), an Italian insurance company that issued Holocaust-era policies and currently does business in California. The district court determined that the four cases were "related" within the meaning of Eastern District of California Local Rule 123(a) and assigned the cases to the same judge, but did not consolidate them.

Plaintiffs sought declaratory and injunctive relief, claiming that HVIRA violates the Commerce Clause, the Due Process Clause, the Equal Protection Clause, and the foreign affairs power. Gerling also asked the court to review two statutes that were enacted at the same time as HVIRA: (1) California Code of Civil Procedure § 354.5 (1999), which allows California residents to bring claims for the payment of Holocaust-era insurance policies and extends the statute of limitations on such claims until December 31, 2010; and (2) California Insurance Code § 790.15 (1999), which requires the Commissioner to suspend the certificate of authority of any insurer who has failed to pay on valid Holocaust-era policies. The Commissioner filed a motion to dismiss in which he argued that Gerling did not have standing to challenge California Code of Civil Procedure § 354.5 or California Insurance Code § 790.15. The district court granted the motion, ruling that Gerling had not established an imminent threat of prosecution under those statutes. Gerling does not challenge that holding.

Plaintiffs all filed motions for a preliminary injunction. The district court granted their motions, holding that "plaintiffs have established a probability of success under the foreign affairs doctrine and the Commerce Clause." The court did not rule on Plaintiffs' other grounds for relief. The district court also held that Plaintiffs had established the likelihood of irreparable injury.

The Commissioner timely appealed the district court's orders in all four cases. We have jurisdiction under 28 U.S.C. § 1292(a)(1). Because these cases all involve the same legal issues, we consider them together.

STANDARD OF REVIEW

We review for abuse of discretion the grant of a preliminary injunction. *FDIC* v. *Garner*, 125 F.3d 1272, 1276 (9th Cir. 1997). A district court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. *Roe* v. *Anderson*, 134 F.3d 1400, 1402 (9th Cir. 1998).

DISCUSSION

A. *The Standard for Issuing a Preliminary Injunction*

"To obtain a preliminary injunction, a party must establish either: (1) probable success on the merits and irreparable injury, or (2) sufficiently serious questions going to the merits to make the case a fair ground for litigation with the balance of hardships tipping decidedly in its favor." *Baby Tam & Co.* v. *City of Las Vegas*, 154 F.3d 1097, 1100 (9th Cir. 1998). The two alternatives represent two points on a sliding scale. *Roe*, 134 F.3d at 1402. The district court held that Plaintiffs' actions fell within the first category. The Commissioner does not dispute the district court's finding of irreparable injury; rather, he questions whether the district court abused its discretion in ruling that Plaintiffs established a probability of success on the merits.

The district court's reasoning implies that Plaintiffs demonstrated a probability of success on their claim that HVIRA is unconstitutional on its face. The court did not make individualized findings of irreparable injury, nor did it discuss either constitutional claim in the context of a particular Plaintiff. As presented in this appeal, Plaintiffs' challenges to HVIRA involve issues of law only.

B. *The Commerce Clause Claim*

As noted, the district court held that Plaintiffs established a probability of success that HVIRA violates the Commerce Clause. We disagree and hold that the district court based its conclusion on an erroneous view of the law.

1. *The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1014 (1945) (McCarran Act)*

In *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553, 88 L. Ed. 1440, 64 S. Ct. 1162 (1944), the Supreme Court held that the "business of insurance" fell within Congress' power to regulate interstate commerce. That holding conflicted with the previous understanding of the relationship between the business of insurance and the Commerce Clause; before 1944, the Court had implied that the states could regulate the insurance industry without federal interference. *See Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 414-16, 90 L. Ed. 1342, 66 S. Ct. 1142 (1946) (discussing the history of insurance regulation and the Commerce Clause).

The McCarran Act was Congress' response. *Id.* Title 15, § 1011 of the McCarran Act states:

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Section 1012(a) provides that the "business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business." The phrase "business of insurance" refers to "the relationship between the insurance company and the policyholder " and includes "the fixing of rates[,] . . . the selling and advertising of policies, and the licensing of companies and their agents." *SEC*

v. *National Sec., Inc.*, 393 U.S. 453, 460, 89 S. Ct. 564, 21 L. Ed. 2d 668 (1969) (citations omitted).

2. *The McCarran Act Applies to HVIRA*

Plaintiffs argue, and the district court held, that the McCarran Act does not apply to HVIRA because it is an impermissible "extraterritorial" regulation, as discussed by the Supreme Court in *FTC* v. *Travelers Health Ass'n*, 362 U.S. 293, 80 S. Ct. 717, 4 L. Ed. 2d 724 (1960), and by this court in *Ace Check Cashing, Inc.* v. *Aetna Casualty & Surety Co. (In re Insurance Antitrust Litigation)*, 938 F.2d 919 (9th Cir. 1991), *aff'd in part, rev'd in part sub nom. Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 125 L. Ed. 2d 612, 113 S. Ct. 2891 (1993). Neither *Travelers* nor *In re Insurance* applies to the present dispute, however.

Travelers and *In re Insurance* involved the interpretation of § 1012(b) of the McCarran Act, which instructs courts not to construe any other federal statute as preempting a state insurance regulation unless there is a clear statement from Congress to do so. Section 1012(b) reads in part: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance[.]" Section 1012(b) also provides that the Sherman Act, the Clayton Act, and the Federal Trade Commission (FTC) Act *do* apply to the "business of insurance," but only "to the extent that such business is not regulated by State law."

The Supreme Court in *Travelers* and this court in *In re Insurance* held that Congress did not intend to shield an insurance company from federal regulation if one state expressly regulated an insurance company's conduct, but the conduct that the federal government sought to regulate occurred in a different state. In *Travelers*, a Nebraska statute prohibited Nebraska insurance corporations from engaging in unfair trade practices "in any other state." 362 U.S. at 296. A Nebraska

insurance corporation argued that the Nebraska statute precluded the FTC, under § 1012(b) of the McCarran Act, from regulating conduct of the insurance corporation that occurred outside Nebraska. The Supreme Court disagreed, concluding that Congress did not intend for the "law of a single State [to take] from the residents of every other State the protection of the" FTC Act. *Id.* at 298.

The Court observed that Congress had delegated its power to regulate insurance because it believed that insurance regulation was a local matter. *Id.* at 302. The Court reasoned that the insurance company's argument would subvert the McCarran Act; if one state had a fair-trade statute that purported to regulate nationwide, an insurance company located there would be free from the reach of the FTC Act in every other state. The Court's interpretation of 15 U.S.C. § 1012(b) avoided this absurd result.

Similarly, in *In re Insurance*, this court applied *Travelers* to reject the notion that Congress intended for the antitrust law of a single state to preclude application of the Sherman Act to insurers' conduct that occurred in other states. *In re Insurance*, 938 F.2d at 928. We noted that "state insurance schemes do not, and could not, purport to regulate the bulk of international insurance transactions." *Id.* (citation and internal quotation marks omitted).

In neither case did the court evaluate the constitutionality under the Commerce Clause of the state act that attempted to regulate "extraterritorially." Instead, both cases involved statutory interpretation. The courts merely held that, irrespective of the constitutional limits of a state's power to regulate extraterritorially, Congress did not intend for the regulatory scheme of one state to protect the citizens of all other states and thereby eliminate the need for federal regulation.

There is a second important distinction between the two cited cases and the present dispute: the difference between

HVIRA and the state laws considered in *Travelers* and *In re Insurance*. In those cases, the state laws sought to regulate directly the conduct of an insurer in another jurisdiction. By contrast, HVIRA seeks only to obtain information about conduct in another jurisdiction, without affecting directly any of that conduct. For those two reasons, neither *Travelers* nor *In re Insurance* answers the question that we face.

The district court's holding that the McCarran Act does not apply to HVIRA also rested on its belief that HVIRA must be viewed as a part of California's overall plan to force foreign insurance companies to settle insurance claims with California's residents. The district court cited HVIRA's legislative findings and declarations and held that HVIRA encourages the resolution of claims concerning Holocaust-era policies "through an international process" and thus attempts to "regulate the decision making authority of European insurance companies to pay or not to pay claims on European policies." That reasoning mischaracterizes HVIRA as a matter of law.

HVIRA, by its terms, does not regulate "the decision making authority of European insurance companies to pay or not to pay claims on European policies" in any way. HVIRA requires California companies only to *provide information* about Holocaust-era insurance policies that they (or any of their affiliates) issued.

A second and separate statute, California Code of Civil Procedure § 354.5, allows California residents to bring claims for payment of Holocaust-era insurance policies. A third statute, California Insurance Code § 790.15, authorizes the Commissioner to suspend the licenses of insurance companies who have not paid valid Holocaust-era claims. The district court dismissed Gerling's action challenging the validity of those two provisions because Gerling lacked standing. In short, the question of the validity of those two statutes must remain for another day.

It is true that, by enacting HVIRA, California's legislature intended to help California residents recover on unpaid policies that were entered into in foreign countries by giving them access to information. It also is likely that California's legislature simply intended to protect its residents from insurance companies that have not paid valid insurance claims.[2] In any event, however, the legislature's stated purpose in enacting a statute is not dispositive of a dormant Commerce Clause challenge. The Commerce Clause seeks to prevent extraterritorial economic "effects," not purposes. *See Healy* v. *Beer Inst.*, 491 U.S. 324, 336, 105 L. Ed. 2d 275, 109 S. Ct. 2491 (1989) ("The critical inquiry is whether the *practical effect* of the regulation is to control conduct beyond the boundaries of the State." Extraterritorial regulation "is invalid regardless" of the intent of the enacting legislature.) (emphasis added); *Birth Hope Adoption Agency, Inc.* v. *Arizona Health Care Cost Containment Sys.*, 218 F.3d 1040, 1044 (9th Cir. 2000) ("The first step in evaluating state regulatory measures under the dormant Commerce Clause is to determine whether it regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce.") (citations and internal quotation marks omitted).

HVIRA's reporting requirements might force a "related" company of a California business to search for information, but that is the extent of HVIRA's "extraterritorial" reach. HVIRA, on its face, does not regulate foreign insurance policies, or control the substantive conduct of a foreign insurer, or otherwise affect "the business of insurance " in any other country.

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[2] The state requests information from foreign insurers in other contexts, too. For example, California Insurance Code § 699.5 (1994) requires insurers that are owned, operated, or controlled by other governments to provide information so that the Commissioner can determine whether "the insurer is subject to any form of subsidy that would enable it to compete unfairly with domestic insurers."

In conclusion, Congress has expressly delegated to the states the power to regulate insurance, free from the constraints of the dormant Commerce Clause. The Supreme Court has noted that the "licensing of companies " is part of the "business of insurance" and is covered by the McCarran Act.[3] *National Sec.*, 393 U.S. at 460. HVIRA is a California insurance regulation of California insurance companies that affects foreign commerce only indirectly. Consequently, the McCarran Act applies and the dormant Commerce Clause does not. *See Benjamin*, 328 U.S. at 430-31 (noting that Congress, through the McCarran Act, "clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for").

3. *HVIRA Does Not Impede the Federal Government's Ability to Speak With "One Voice" on a Matter Affecting Foreign Commerce*

HVIRA touches on foreign commerce because of the indirect effect described above. The question remains whether that fact provides an independent reason to hold that Plaintiffs have established a probability that HVIRA is unconstitutional. The answer is "no."

The Supreme Court confronted a similar issue in *Barclays Bank PLC* v. *Franchise Tax Board*, 512 U.S. 298, 129 L. Ed. 2d 244, 114 S. Ct. 2268 (1994). There, the Court considered whether California's worldwide-reporting tax system violated the dormant Commerce Clause. The Supreme Court, after noting that the California tax was constitutional under typical dormant Commerce Clause analysis, evaluated whether the

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[3] Plaintiffs implicitly recognize that HVIRA regulates the "business of insurance." Seeking information from insurers about their claims-paying record, to be used in the licensing process, is a form of regulating the business of insurance.

tax's effect on *foreign* commerce impaired the federal government's ability to speak with "one voice." *Id.* at 328. The Court held that it did not. *Id.*

The Court noted that Congress had considered, and eventually rejected, legislation that would have precluded state statutes like the one in dispute in *Barclays*. *Id.* at 324-28. The Court reasoned that Congress was willing "to tolerate" the states' worldwide-reporting tax statutes. *Id.* at 327. Significantly, the Court then observed that "the foreign policy of the United States . . . [is] much more the province of the Executive Branch and Congress than of this Court"; therefore, the foreign companies' argument that the California statute "is unconstitutional because it is likely to provoke retaliatory action by foreign governments is directed to the wrong forum." *Id.* at 327-28 (citation and internal quotation marks omitted).

Similarly, in *Wardair Canada, Inc.* v. *Florida Department of Revenue*, 477 U.S. 1, 106 S. Ct. 2369, 91 L. Ed. 2d 1 (1986), the Court evaluated whether a Florida tax on airline fuel, which increased the tax liability of foreign airlines, prevented the federal government from speaking with "one voice." The Court concluded that the Florida tax did not violate the Commerce Clause. *Id.* at 12-13. The federal government had entered into more than 70 bilateral aviation agreements, none of which purported to *preclude* the type of tax enacted by Florida. The Court reasoned: "By negative implication . . ., the United States has at least acquiesced" in the type of statute enacted by Florida. *Id.* at 12. Moreover, "it would turn dormant Commerce Clause analysis upside down to apply it where the Federal Government has acted, and to apply it in such a way as to *reverse* the policy that the Federal Government has elected to follow. . . . [T]he Federal Government is entitled in its wisdom to act to permit the States varying degrees of regulatory authority." *Id.* (emphasis in original).

Barclays and *Wardair Canada* teach that, before we can hold that an otherwise constitutional state statute[4] that affects foreign commerce is unconstitutional because it prevents the federal government from speaking with "one voice, " we must examine whether the federal government has *chosen* to permit the states to act. After conducting that examination, we hold that Congress has spoken affirmatively in the area of Holocaust-era insurance policies and has acquiesced in state laws like HVIRA.[5]

In 1998, Congress passed the U.S. Holocaust Assets Commission Act of 1998 (Holocaust Act), Pub. L. 105-186, 112 Stat. 611, as amended Pub. L. 106-155, § 2, 113 Stat. 1740 (1999) (codified at 22 U.S.C. § 1621 note), in order "to establish a commission to examine issues pertaining to the disposition of Holocaust-era assets in the United States . . . and to make recommendations to the President on further action, and for other purposes." Holocaust Act Intro. The Holocaust Act instructs the Commission to "conduct a thorough study and develop a historical record of" certain assets, "if such assets came into the possession or control of the Federal Government." *Id.* § 3(a)(1). The Commissioner and Amicus the State of California argue that § 3(a)(4), which concerns Holocaust-era insurance policies, is relevant to this litigation:

> In carrying out its duties under this Act, the Commission shall take note of the work of the National Association of

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[4] In both *Barclays* and *Wardair Canada*, the state statute was "otherwise constitutional" because it did not discriminate against interstate commerce, while in the present case HVIRA is "otherwise constitutional" because of the McCarran Act.

[5] A much stronger case for congressional acquiescence exists here than in *Wardair Canada* or *Barclays*. In those cases, the Court inferred congressional acquiescence by negative implication. In the present case, however, we need not draw a negative inference from what Congress did *not* say, but can draw a positive inference from what Congress *did* say in the Holocaust Act.

> Insurance Commissioners with regard to Holocaust-era insurance issues and shall encourage the National Association of Insurance Commissioners to prepare a report on the Holocaust-related claims practices of all insurance companies, both domestic and foreign, doing business in the United States at any time after January 30, 1933, that issued any individual life, health, or property — casualty insurance policy to any individual on any list of Holocaust victims . . . .

Id. § 3(a)(4)(A). The report by the National Association of Insurance Commissioners (NAIC) "should include the following, to the degree the information is available": (1) the number of policies issued by insurance companies to victims of the Holocaust; (2) the value of each policy at the time of issue; (3) the total number of policies, and the dollar amounts, that have been paid out; and (4) the total present-day value of assets in the United States of each company. *Id.* § 3(a)(4)(B). Section 3(a)(3), entitled "Coordination of Activities," states that the Commission "shall, to the maximum extent practicable, coordinate its activities with, and not duplicate similar activities already being undertaken by, private individuals, private entities, or *government entities*, whether *domestic* or foreign." (Emphasis added.) Section 3(b) adds that the Commission "shall review comprehensively any *research* by . . . *non-Federal government entities*, whether *domestic* or foreign." (Emphasis added.)

The Holocaust Act does not refer in so many words to state legislation as a cause of domestic governments' undertaking this "research," § 3(b), nor does it explain what "work" of NAIC the Commission is to take "note" of, § 3(a)(4). There are several reasons, however, why we read the Holocaust Act to embrace state legislation like HVIRA.

NAIC is an organization of insurance regulators from the 50 states. The Holocaust Act asks for detailed information on the Holocaust-related claims practices of "*all insurance companies, both domestic and foreign*, doing business in the United States at any time after January 30, 1933." *Id.* § 3(a)(4)(A) (emphasis added). This information is to include data on individual Holocaust-era policies. *Id.* If Congress was expecting a detailed report on the claims practices and policies of "foreign" insurance companies from an organization consisting only of state insurance regulators, Congress must have expected that the regulators would be acting pursuant to state law. Congress must also have been aware that, in order to fulfill the Holocaust Act's broad objectives, state insurance commissioners might have to require the foreign affiliates of domestic insurance companies to search a foreign office for information on Holocaust-era policies.

Even if Congress' reference to the "work" of NAIC is not, by itself, encouragement of state statutes like HVIRA, Congress was aware that domestic governmental entities were conducting research into the activities of Holocaust-era insurers. As noted, § 3(b) of the Holocaust Act requires the Commission to "review comprehensively any research by . . . *non-Federal government entities*, whether domestic or foreign" (emphasis added), and § 3(a)(3) requires the Commission to "coordinate its activities" with those of domestic governmental entities.

The legislative history of the Holocaust Act supports our conclusion that Congress was aware of the states' efforts to obtain information on Holocaust-era insurance policies. In 1998, there was a flurry of activity in Congress relating to Holocaust-era assets. On February 12, 1998, the House Committee on Banking and Financial Services held a hearing on "The Restitution of Art Objects Seized by the Nazis from Holocaust Victims and Insurance Claims of Certain Holocaust Victims and Their Heirs": Hearing Before the House Comm. on Banking & Fin. Servs., 105th Cong. 131 (Feb. 12, 1998).

State Insurance Commissioners Quackenbush (of California) and Senn (of Washington) testified at that hearing. Commissioner Senn noted that she chaired the NAIC

"Holocaust Insurance Issues Working Group," which was investigating Holocaust-era insurance issues with the help of "state insurance departments." *Id.* 1998 WL 65380. She explained that NAIC had requested voluntary cooperation from the insurance companies but, "if our requests for cooperation are not satisfied, then the states may begin to exercise [regulatory] powers." *Id.* "Congress and the States can work together," Commissioner Senn concluded. *Id.* 105th Cong. at 134. Commissioner Quackenbush added that he had held hearings in California relating to this issue, and he was "prepared to revoke [the] certificate of authority, which allows a company to sell insurance in California, for [any insurance company] and any of its American subsidiaries, if it fails to" provide information on Holocaust-era policies. *Id.* at 142. The Chair of the House committee, Representative Leach, who sponsored the Holocaust Act two months later, noted:

> [L]et me say that because this is an issue of international significance, there are aspects of the American system that are not widely understood abroad, and one relates to the Federal nature of America, particularly in the insurance arena, *the decision of the United States Congress, in effect, either to devolve or not to assume responsibility for basic insurance regulation, which gives the States a significant role. And that means that as two symbolic State insurance commissioners, there's a great deal of authority that resides in your offices.*

Id. at 157 (emphasis added).[6] On the basis of the text, context, and history of the Holocaust Act, we conclude that Congress was aware of the states' involvement in this area and, at least implicitly, encouraged laws like HVIRA.

Notwithstanding the Holocaust Act, Plaintiffs argue, and the district court held, that HVIRA conflicts with a federal

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[6] Representative Leach submitted a draft of the bill, H.R. 3662, to the House on April 1, 1998. See 1998 Cong. Q. 3662, 105th Cong., 2d Sess.

policy relating to "Holocaust victims compensation efforts" as evidenced by three actions undertaken by the executive branch. They are: (1) the Foundation Agreement between Germany and the United States (Foundation Agreement); (2) the International Commission on Holocaust Era Insurance Claims (ICHEIC); and (3) the Swiss-US Joint Statement. The following is a brief summary of each:

a. *The Foundation Agreement*

In December 1999, the German government and German companies agreed to fund a DM 10 Billion Foundation to settle Nazi-era claims, in exchange for the voluntary dismissal of lawsuits that had been filed against German companies. The German government has agreed to fund the Foundation when all such claims pending in United States courts have been finally dismissed.

On July 17, 2000, the United States and the German government signed the Foundation Agreement. The Agreement recognizes "as legitimate the interest German companies have in all-embracing and enduring legal peace." It also states that "it would be in the interests of both parties for the Foundation to be the exclusive remedy and forum for addressing all claims[] that have been or may be asserted against German companies" arising from Nazi-era activities. Foundation Agreement at 2, 4.

The United States, in Article 2 of the Foundation Agreement, agreed to the following in pertinent part:

> (1) The United States shall, in all cases in which the United States is notified that a claim described in article 1 (1) has been asserted in a court in the United States, inform its courts through a Statement of Interest . . . that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving such claims asserted against German companies

> . . . and that dismissal of such cases would be in its foreign policy interest.
>
> (2) The United States, recognizing the importance of the objectives of this agreement, including all-embracing and enduring legal peace, shall, in a timely manner, use its best efforts, in a manner it considers appropriate, to achieve these objectives with state and local governments.

Annex B of the Foundation Agreement explains that the United States will "recommend dismissal" of lawsuits "on any valid legal ground." Paragraph seven of Annex B recognizes, however, that the "United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal, but will reinforce the point that U.S. policy interests favor dismissal on any valid legal ground."

b. *The ICHEIC*

The ICHEIC was established in 1998 by NAIC in cooperation with several European insurance companies, European regulators, representatives of nongovernmental organizations, and the State of Israel. The United States has the status of an "observer." The ICHEIC is a voluntary, private organization that was created with the goal of implementing a "just process . . . that will expeditiously address the issue of unpaid [Holocaust-era] insurance policies." The ICHEIC creates an "International Commission" that is charged with initiating an "investigatory process to determine the current status of those insurance policies . . . for which claims are filed." To assess the remaining unpaid insurance policies of Holocaust victims, "a reasonable review will be made of the participating companies' files."

c. *The Swiss-US Joint Statement*

At the inaugural meeting of the Swiss-US Joint Economic Commission in January 2000, the two countries issued a Joint Statement stating that they "have decided to endow their

partnership with a long-lasting perspective, through continued and institutionalized dialogue." Section 2.4(b) of an "Action Plan" annexed to the Joint Statement notes that many Swiss insurance companies have settled insurance lawsuits, and "U.S. authorities will call on the U.S. State insurance Commissioners and State legislative bodies to refrain from taking unwarranted investigative initiatives or from threatening or actually using sanctions against Swiss insurers."

We next consider the effect of those three actions on the validity of HVIRA. Significantly, Plaintiffs do not argue that HVIRA is preempted by any of the three. Instead, Plaintiffs claim that the three actions simply are evidence of a foreign policy with which HVIRA conflicts. We are not persuaded.

First, we question whether there is in fact any policy conflict between HVIRA, the enactment of which Congress encouraged in the federal Holocaust Act, and the executive branch initiatives. HVIRA seeks information for two main purposes: enabling victims of the Holocaust to know whether they have insurance claims, and protecting Californians from insurers that have not paid valid claims. The second purpose conflicts with no federal policy of which we are aware. The first is consistent with the overall goal of the three initiatives: to resolve Holocaust-era claims. In other words, the Holocaust Act, HVIRA, and the executive branch initiatives share the same policy objective, although they seek to achieve that policy objective by varying techniques.

Second, we note that two of the executive branch initiatives are country-specific. The German Foundation Agreement pertains to German insurers. The Swiss-US Joint Statement pertains to Swiss insurers. That being so, neither of those initiatives governs with respect to Generali (an Italian insurer) or Winterthur (which apparently has affiliates throughout Europe).

Third, as Plaintiffs concede, none of the three initiatives has preemptive effect. The German Foundation Agreement

mentions the United States' interest in the *voluntary* dismissal of lawsuits against German corporations and, by its terms, "does not suggest that [the United States'] policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal" of any lawsuit. Foundation Agreement, Annex B, P 7. The ICHEIC is not an official executive branch action at all; it is a *voluntary, private* organization in which the United States has the role of a mere observer.

Of the three, only the Swiss-US Joint Statement refers specifically to a policy on gathering information about Holocaust-era insurance policies: the executive branch "will call on the U.S. State insurance Commissioners and State legislative bodies to refrain from taking unwarranted investigative initiatives or from threatening or actually using sanctions against Swiss insurers." Swiss-US Joint Statement, Action Plan § 2.4(b). That is hortatory, not mandatory, wording. But even if we were to assume that a conflict exists between the Holocaust Act and the Swiss-US Joint Statement with regard to seeking information from Swiss insurers,[7] Congress' action controls in this instance. Article I, § 8 of the United States Constitution expressly grants Congress the authority to regulate foreign commerce. Article II, § 2 of the Constitution grants the executive branch the authority, with the consent of the Senate, to make treaties but, as noted, the Swiss-US Joint Statement is not a treaty, and preemption is not an issue here. Plaintiffs' argument that a "policy interest" found in an executive branch "Joint Statement" creating an Economic

[7] It is unclear from the Swiss-US Joint Statement what "investigative initiatives" by "State legislative bodies" are considered to be "*unwarranted*." (Emphasis added.) By implication, states may seek information if the inquiry is "warranted." Arguably, the Holocaust Act is a statement from Congress that statutes like HVIRA are warranted.

Commission trumps Congress' express constitutional authority to regulate foreign commerce is incorrect.[8]

In this connection, Plaintiffs draw our attention to letters in which executive branch officials argue that HVIRA does conflict with the federal government's policy concerning Holocaust-era claims. In *Barclays*, the Supreme Court rejected a similar argument. The plaintiff in *Barclays* had pointed to "a series of Executive Branch actions, statements, and amicus filings . . . that, taken together, . . . constitute a clear federal directive proscribing States' use of worldwide combined reporting." 512 U.S. at 328 (citation and internal quotation marks omitted). The Court held that the executive branch's actions "cannot perform the service for which [the plaintiff] would enlist them. The Constitution expressly grants Congress, not the President, the power to 'regulate Commerce with foreign Nations.'" *Id.* at 328-29 (quoting U.S. Const. art. I, § 8, cl. 3).

In conclusion, the district court erred when it held that Plaintiffs established a likelihood of success on the question whether HVIRA violates the Commerce Clause.

C. *The Foreign Affairs Power*

The district court also held that Plaintiffs established a probability of success on their claim that HVIRA violates the federal government's power over foreign affairs. The court reasoned, and Plaintiffs argue, that HVIRA has more than an "incidental effect on foreign countries" and has the potential to "disrupt and embarrass" the federal government in the field of foreign relations. We disagree as a matter of law.

[8] *Cf.* Louis Henkin, Foreign Affairs and the U.S. Constitution 89 (2d ed. 1996) ("Whatever, then, the President might have authority to do by treaty or other international agreement, he cannot unilaterally regulate commerce with foreign nations . . . .").

1. *Relevant Law*

The federal government's foreign affairs power is not mentioned expressly in the text of the Constitution but, rather, is derived from the structure of the Constitution and the nature of federalism.[9] *See generally* Harold G. Maier, *Preemption of State Law: A Recommended Analysis*, 83 Am. J. Int'l L. 832, 836-37 (1989). The power is rarely invoked by the courts; the Supreme Court has not applied it in more than 30 years, since *Zschernig* v. *Miller*, 389 U.S. 429, 19 L. Ed. 2d 683, 88 S. Ct. 664 (1968).

The plaintiff in *Zschernig* challenged an Oregon probate law that allowed a foreign citizen to inherit from a decedent's estate only if United States citizens could inherit from a decedent's estate in the foreign citizen's country. The Supreme Court had held in *Clark* v. *Allen*, 331 U.S. 503, 517, 91 L. Ed. 1633, 67 S. Ct. 1431 (1947), that a California probate law with a similar reciprocity provision did not, on its face, violate the Constitution, because the statute had only "some incidental or indirect effect in foreign countries." In *Zschernig*, the Court refused to reconsider its facial holding in *Clark*, but held that Oregon's statute, *as applied*, was an unconstitutional "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." 389 U.S. at 432-33.

The Court in *Zschernig* pointed, with disapproval, to many examples of judges' pontificating on the policies of foreign nations. *Id.* at 433-34. The Court concluded that "the type of probate law that Oregon enforces affects international relations in a persistent and subtle way." *Id.* at 440. The Court observed

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[9] The foreign affairs power also has been referred to as "dormant foreign relations preemption." Curtis A. Bradley & Jack L, Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815, 864 (1997); *see also* Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824, 1847 (1998).

that "'international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government.'" *Id.* at 441 (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 64, 85 L. Ed. 581, 61 S. Ct. 399 (1941)). Here, of course, we address a facial (*Clark*), not an as-applied (*Zschernig*) challenge.

The parties call our attention to two more recent cases in which other circuit courts have confronted a foreign affairs challenge. In *National Foreign Trade Council* v. *Natsios*, 181 F.3d 38, 51-52 (1st Cir. 1999), the First Circuit held that a Massachusetts law that prohibited state agencies from purchasing goods from companies doing business with a specific country, Burma (the Burma Law), violated the foreign affairs power, the dormant Commerce Clause, and the Supremacy Clause. Notably, the Supreme Court affirmed the First Circuit's ruling that the Burma Law was preempted by federal law under the Supremacy Clause, but the Court did not rule on the foreign affairs question. *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 120 S. Ct. 2288, 2294-95 n.8, 147 L. Ed. 2d 352 (2000).

In *Trojan Technologies, Inc.* v. *Pennsylvania*, 916 F.2d 903 (3d Cir. 1990), a Canadian corporation argued that a Pennsylvania "Buy American" law violated the foreign affairs power. The Third Circuit held that the statute did not violate the Commerce Clause, the Supremacy Clause, or the foreign affairs power. The court reasoned that "any state law that involves the state in the actual conduct of foreign affairs is unconstitutional," but "any action that has only some incidental or indirect effect in foreign countries" is not. *Id.* at 913 (citation and internal quotation marks omitted). The court then held that the "Buy American" statute "exhibits none of the dangers attendant on the statute reviewed" in *Zschernig*, because: (1) Pennsylvania's statute provided no opportunity for state officials to comment on the nature of foreign regimes; (2) the Pennsylvania statute, on its face, did not single out any

particular foreign country; (3) there was no evidence that the statute had been applied selectively according to attitudes concerning foreign policy; and (4) there was evidence that Congress had recently directed its attention to "Buy American" statutes, but did not take steps to preempt them.[10] *Id.* at 913-14; *see also* K.S.B. *Technical Sales Corp.* v. *North Jersey Dist. Water Supply Comm'n*, 75 N.J. 272, 381 A.2d 774, 784 (N.J. 1977) (holding that New Jersey's "Buy American" statute did not violate the foreign affairs power because it did not "result demonstrably in a significant and direct impact upon foreign affairs"). *But see Bethlehem Steel Corp.* v. *Board of Comm'rs*, 276 Cal. App. 2d 221, 225-27, 80 Cal. Rptr. 800 (Ct. App. 1969) (holding that a California "Buy American" statute violated the foreign affairs power).

2. *Zschernig Does Not Apply to HVIRA*

We are not persuaded that *Zschernig* applies to HVIRA. In *Zschernig*, the Oregon probate statute violated the foreign affairs power because, *as applied*, it allowed Oregon judges to insult foreign nations. 389 U.S. at 433-35. In *Clark*, the Court held that a similar California statute, *on its face*, did not violate the Constitution. *See Zschernig*, 389 U.S. at 432 (noting that, in *Clark*, the Court held that "a general reciprocity clause did not on its face intrude on the federal domain"). HVIRA regulates insurance companies that do business in California and are, or are related to, companies that issued Holocaust-era insurance policies. No Plaintiff is a foreign government, nor is any Plaintiff owned in whole or in part by a foreign government; they are, simply, businesses. Unlike the statute considered in *Natsios*, HVIRA does not refer to any particular country. As in *Trojan*, there is no evidence that HVIRA would be applied in a way that would implicate the diplomatic concerns mentioned in *Zschernig*.

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[10] The *Trojan* court's fourth reason echoes the reasoning of the foreign commerce cases, *Barclays* and *Wardair Canada*, discussed, in Part B(3), above.

Because *Zschernig* has been applied so sparingly, because *Clark* remains intact, and because the Supreme Court's foreign commerce cases have taken a different approach (as we discussed above), we hesitate to apply *Zschernig* to a facial challenge to state statutes involving "foreign affairs" (a) but that mainly involve foreign commerce and (b) that are not directed at a particular country. HVIRA, on its face, involves commerce alone, and it is not, on its face, directed at any particular foreign country. For those reasons, we conclude that *Zschernig* does not govern.

D. *The Due Process Clause Claim*

Plaintiffs Generali and Winterthur argue that HVIRA violates the "legislative prong" of the Due Process Clause, which "limits the power of a forum state to apply its substantive law to factual and legal situations with which it has little or no contact." Additionally, Winterthur argues that HVIRA "violates the most basic notions of fundamental fairness " because it takes "away the licenses of California insurers for failure to perform tasks that are literally impossible." Moreover, Winterthur asserts, the reporting requirement is "arbitrary and irrational."

Plaintiffs cite a recent case, *Gerling Global Reins. Corp.* v. *Nelson*, 123 F. Supp. 2d 1298, 1303-04 (N.D. Fla. 2000), in which the District Court for the Northern District of Florida held that a Florida Holocaust-era insurance statute violates the legislative prong of the Due Process Clause. The court noted that, under Eleventh Circuit precedent, there must be "'some minimal contact between a State and the regulated subject before it can, consistently with the requirements of due process, exercise legislative jurisdiction.'" *Id.* at 1301 (quoting *American Charities for Reasonable Fundraising Reg., Inc.* v. *Pinellas County*, 221 F.3d 1211, 1216 (11th Cir. 2000)).

It is possible that HVIRA violates the Due Process Clause, but the district court did not reach that issue, and it is not fully developed in the record or in the briefs presented to this court.

We leave the preliminary injunction in place in order to give the district court an opportunity to consider whether Plaintiffs are likely to succeed on the merits.[11] (Defendant does not challenge the district court's conclusion that Plaintiffs established a likelihood of irreparable harm; they may lose the right to continue to do business in California if the statute takes effect.)

CONCLUSION

We hold that the district court erred when it decided that HVIRA violates the dormant Commerce Clause and the foreign affairs power. However, because the district court has not addressed Plaintiffs' claim that HVIRA violates the Due Process Clause, we leave the preliminary injunction in place and remand for further proceedings.

Preliminary injunction AFFIRMED; REMANDED for further proceedings.

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[11] Defendant acknowledged at oral argument that a serious question may exist concerning HVIRA and the Due Process Clause. When questioned about whether HVIRA requires that the Commissioner suspend the license of a California insurer who is unable to produce the information required by HVIRA, either because of European privacy laws or because the company has no control over the information, counsel stated that HVIRA requires the suspension of the license nonetheless. Counsel then said that the issue "is really a due process issue" and that any evidence of a company's inability to produce information should be evaluated "as part of a due process analysis, and that's where we think that issue properly lies."

APPENDIX C

GERLING GLOBAL REINSURANCE CORP. OF AMERICA, et al., Plaintiffs, v. HARRY LOW, in his capacity as the INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, *Defendant*.

No. CIV. S-00-0506 WBS JFM Consolidated Cases: No. CIV. S-00-0613 WBS JFM, No. CIV. S-00-0779 WBS JFM, No. CIV. S-00-0875 WBS JFM

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

October 1, 2001, Decided

October 2, 2001, Filed

MEMORANDUM AND ORDER

In October 1999, California enacted the Holocaust Victim Insurance Relief Act ("HVIRA"). *See* Cal. Ins. Code §§ 13800-13807 and accompanying regulations, Cal. Code Regs. Tit. 10 §§ 2278-2278.5. HVIRA relates to claims asserted by Holocaust victims or their heirs or beneficiaries for coverage under insurance policies issued in Europe between 1920 and 1945. The stated purpose of HVIRA is to ensure that insurance companies doing business in the State of California disclose to the state "any involvement they or their related companies may have had with insurance policies of Holocaust victims." Cal. Ins. Code § 13801(e). HVIRA further declares that insurers in California have a responsibility to "ensure the rapid resolution of these questions [regarding unpaid Holocaust-era insurance policies], eliminating further victimization of these policyholders and their families." *Id.*

After briefing and a hearing regarding various constitutional challenges to the statute, this court found, in June

of 2000, that plaintiffs had shown a probability of success on the merits of two of their claims: (1) that HVIRA interferes with the federal government's control over foreign affairs; and (2) that HVIRA violates the Commerce Clause, and therefore granted a preliminary injunction enjoining enforcement of the statute. The Ninth Circuit reversed the holdings upon which that injunction was based, but left the injunction in place, specifically referencing the "possibility" that HVIRA violates the Due Process Clause. *Gerling Global Reins. Corp. of Am. v. Low*, 240 F.3d 739, 754 (9th Cir. 2001), *petition for cert. filed* (U.S. June 26, 2001) (No. 00-1926).

The matter is now before this court on the parties' cross motions for summary judgment. All plaintiffs jointly move for summary judgment on the grounds that HVIRA violates the Due Process Clause because: (1) it is an extraterritorial regulation enacted in excess of California's legislative jurisdiction; and (2) it mandates the performance of impossible tasks and provides for automatic license revocation upon non-performance. Defendant moves for summary judgment, and for the preliminary injunction to be dissolved, on the grounds that: (1) the Ninth Circuit's decision precludes any claim that HVIRA violates either the Foreign Affairs Power or the Commerce Clause; (2) HVIRA does not violate the Due Process Clause; and (3) HVIRA is not unconstitutional for any other reason raised in any plaintiff's complaint.

I. *Facts*

A. *The Statutory Framework*

After the National Socialist (NAZI) party came to power in Germany, it enacted a series of statutes authorizing governmental confiscation of Jewish property and other assets. These laws included insurance proceeds among the types of property that the government was authorized to seize from Jews. Under the NAZI statutes, German insurers were required to pay the proceeds of insurance policies of Jewish residents to "blocked accounts" controlled by the NAZI government. A

1943 statute also ordered confiscation of the estates of deceased Jews. Furthermore, although many Holocaust victims had insurance policies, many lost the papers during their imprisonment. In many cases, the persons most knowledgeable about the policy were killed, leaving heirs without a paper trail. As a result, many Holocaust victims and their descendants and heirs have never collected on their insurance policies.

HVIRA requires insurance companies doing business in California to file reports disclosing policies issued in Europe during the period 1920-1945. *See* Cal. Ins. Code §§ 13800-13807. Other enabling statutes extend the statute of limitations for filing such claims (Cal. Civ. Proc. Code § 354.5), and provide procedures for the suspension of licenses of insurance companies who have not paid valid claims (Cal. Ins. Code § 790.15).[1]

B. *The Challenged Statute: California Insurance Code § § 13800-13807 ("HVIRA")*

HVIRA obligates insurers doing business in California to file reports identifying insurance policies (life, property, liability, health, annuities, dowry, educational, or casualty) sold to persons in Europe between 1920 and 1945 directly or through a "related company." Cal. Ins. Code § 13804(a). A "related company" is defined as "any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer." Cal. Ins. Code § 13802(b).

Specifically, the statute requires the insurer or related company to file with the registry: (1) the number of those insurance policies; (2) the holder, beneficiary, and current status of those policies; and (3) the city of origin, domicile, or address for each policy holder. Cal. Ins. Code § 13804(a). Filing false information under this section is punishable by civil

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[1] Defendant's motion to dismiss plaintiffs' constitutional challenges to Cal. Civ. Proc. Code § 354.5(c) and Cal. Ins. Code § 790.15(c) for lack of standing was granted in June of 2000.

penalties of up to $ 5,000.00 per policy.

Further, with regard to each policy, the insurer must certify one of the following: (1) that the proceeds of the policies have been paid to the designated beneficiaries or their heirs where that person or persons, after diligent search, could be located and identified; (2) that the proceeds where the beneficiaries or heirs could not, after diligent search, be located or identified, have been distributed to Holocaust survivors or to qualified charitable nonprofit organizations for the purpose of assisting Holocaust survivors; (3) that a court of law has certified in a legal proceeding resolving the rights of unpaid policyholders, their heirs, and beneficiaries, a plan for the distribution of the proceeds; or (4) that the proceeds have not been distributed and the amount of those proceeds. Cal. Ins. Code § 13804(b).[2]

The statute also directs that, if the reports are not filed by the 210th day after the HVIRA becomes effective, the Commissioner "*shall* suspend the certificate of authority to conduct insurance business in the state . . . ." Cal. Ins. Code § 13806. (emphasis added).

C. *The Parties*

Defendant is Harry Low in his capacity as the Commissioner of Insurance of the State of California. Plaintiffs are insurance companies licensed to do business in California. Four sets of plaintiffs originally filed separate complaints against then-Insurance-Commissioner Chuck Quackenbush. Those cases were consolidated as the present action and the plaintiffs now move jointly.

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[2] The term "proceeds" is defined in the statute as "the face value or other payout of insurance policies and annuities plus reasonable interest to date of payment without dimunition for wartime or immediate postwar currency devaluation." Cal. Ins. Code § 13802(c).

1. *Gerling Global Reinsurance Corporation of America ("the Gerling plaintiffs")*

The Gerling plaintiffs are five insurance companies licensed to do business in California. They are "related to" or "affiliated" with two German companies (Gerling-Konzern Allgemenine Versicherungs-AG ("GKA") and Gerling-Konzern Lebensversicherungs-AG ("GKL") that issued policies in Europe during the proscribed time period.

GKA and GKL do not conduct any business in the State of California either directly or through the Gerling plaintiffs. None of the Gerling plaintiffs is in possession, custody or control of records pertaining to any insurance policies in force in Europe at any time between 1920 and 1945. Further, the Gerling plaintiffs contend that they have no means to compel such information from their German affiliates. GKA and GKL believe that if they produce the information demanded by the HVIRA, they will face criminal and civil penalties under German law.[3]

2. *American Insurance Association and American Re-Insurance Co. (the "American plaintiffs")*

The American plaintiffs are American Insurance Association ("AIA") and American Reinsurance Company ("AmRe"). AIA is a national trade association of insurers, some of whom do business in California. AIA principally represents American insurance companies that did not issue insurance policies in Europe during the relevant period and do not own or control any companies that did.[4] Several members of AIA are, however, "related to" European companies that issued policies

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[3] The parties have submitted competing expert declarations reaching differing conclusions as to whether German privacy law actually does preclude the HVIRA-mandated disclosures.

[4] American Insurance does represent Assicurazioni Generali, a European Company discussed separately herein.

during the relevant time period. AIA's affected members contend that they lack the corporate authority to compel their related European companies to produce the information required by the HVIRA. Further, plaintiffs believe that the law of the related European company's country forbids the disclosure of the kind of information required by HVIRA.

AmRe is a large insurance company licensed to do business in California. Neither AmRe, nor any subsidiary or affiliate over which it has control, issued insurance policies that were in effect in Europe from 1920 to 1945. AmRe is subject to the HVIRA's reporting requirements because it is "related," through its parent corporation, Munich Re, to two European insurers that issued insurance policies in Europe from 1920 to 1945. AmRe contends that neither AmRe nor Munich Re has the corporate authority to compel these European companies to produce the information required by the HVIRA. Further, according to AmRe, Munich Re believes it would have to violate German law in order to comply with HVIRA.

3. *Winterthur International American Insurance Co., et al. ("the Winterthur plaintiffs")*

The Winterthur plaintiffs are nine insurance companies licensed to do business in California. None of the companies ever issued insurance policies in Europe during the applicable time period, though each is "related" to such a company. Each plaintiff claims, however, that it is not in possession, custody, or control of any records pertaining to insurance companies [sic] sold by "related companies." Further, the Winterthur plaintiffs contend that they lack the corporate authority to compel the production of the information required by the HVIRA. They also believe that to do so would violate European law.

4. *Assicurazioni Generali, S.p.A. ("Generali")*

Generali is an Italian corporation licensed to do business in California. It issued insurance policies in Europe during the applicable time period. The policies in question were issued in

Europe to European insureds. According to Generali, these policies typically incorporated terms and conditions regulated by the laws of the country of issuance. For example, local laws "typically" required that reserves earmarked for these policies were to be maintained in the country of issuance and invested locally. (Carnicelli Decl. P 3.). Apparently, some of the policies also included forum selection clauses requiring that disputes be heard in the country of issuance.

Though Generali cannot make the argument that it lacks the corporate authority to obtain the information necessary to comply with HVIRA, it has joined the joint motion arguing that making those disclosures would violate German law and subject the company to criminal and civil penalties.

D. *Defendant's Enforcement and Interpretation of the HVIRA Statutory and Regulatory Scheme*

1. *Prior to the Preliminary Injunction*

Prior to the issuance of the preliminary injunction, then-Commissioner Chuck Quackenbush actively threatened enforcement against all plaintiffs. He subpoenaed many insurance companies, including plaintiffs and those represented by plaintiffs, to appear at a hearing on December 1, 1999. At that hearing, Quackenbush informed the insurance companies, "this issue will be resolved in California. I promised that for the last two years. And on April 6th, you're going to see just how serious California is if you have not complied with this law." (Agel Decl., Ex. 18, Transcript of December 1, 1999 Investigatory Hearing, 14:16-20). He told Generali specifically, "I want you to take back to your officers in Italy and everywhere else, that you might want to consider seriously leaving the State, because it's obvious to me right now that you have no intention of complying with the law." (Agel Decl., Ex. 18, 49:12-16). At the end of questioning Generali, Quackenbush stated generally, "it is your choice now whether you're going to work with this Department of Insurance to bring your company in full compliance, whether you're going

to leave the state voluntarily, or whether I'm going to kick you out. That's your three choices." (Agel Decl., Ex. 18, 51:19-23).

The preliminary injunction has prevented any such action as of yet. Meanwhile, there has been a change of leadership at the Department of Insurance, and plaintiffs have taken discovery regarding the manner in which the Department interprets and would implement HVIRA.

2. *Since the Preliminary Injunction*

Leslie Tick, a senior counsel at the California Department of Insurance who is responsible for administering HVIRA, gave deposition testimony in this case as the Department's spokesperson on July 5, 2001. She testified that the only defense to non-compliance with HVIRA's reporting requirements is that the required documents do not exist. Failure to comply for any other reason, including lack of the corporate authority to compel production of the information or a belief that doing so would violate applicable European law, will trigger a license suspension action. (Agel Decl., Ex. 17, Tick Depo. at 227:9-238:17, 252:13-266:16).

Under questioning as to how HVIRA's mandatory suspension provision would be carried out by the Department, Ms. Tick further testified that a license suspension proceeding would involve a hearing before an administrative law judge to determine whether the insurer had complied with the statute. The judge would not, however, be able to exercise any discretion in his determination depending on whether the insurer was participating in good faith in ICHEIC, or whether the insurer could show that it did not control the information sought by HVIRA, or whether it could show that it or its affiliates were barred from producing the information by European privacy laws. *Id.* at 175:5-176:13.

II. *The Standard*

The court must grant summary judgment to a moving party "if the pleadings, depositions, answers to interrogatories, and

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party adverse to a motion for summary judgment may not simply deny generally the pleadings of the movant; the adverse party must designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Simply put, "a summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). The non-moving party must show more than a mere "metaphysical doubt" as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

III. *Plaintiffs' Joint Motion for Summary Judgment*

Plaintiffs jointly move for summary judgment on the ground that HVIRA is an unconstitutional violation of the Due Process Clause of the U.S. Constitution.

A. *Law of the Case Doctrine*

The parties dispute both the meaning and effect of the Ninth Circuit's decision in *Gerling v. Low*, 240 F.3d 739 (9th Cir. 2001). As a threshold matter, it must be determined what issues are now properly before this court.

Defendant contends that the Ninth Circuit's *Gerling v. Low* opinion "effectively disposes of" all of plaintiffs' claims. Defendant argues: (1) that the Ninth Circuit's ruling finally disposes of plaintiffs' Commerce Clause and Foreign Affairs Power arguments; and (2) that the following language from the opinion precludes any argument that the statute regulates extraterritorially because it is controlling under the "law of the case" doctrine: "HVIRA is a California insurance regulation of California insurance companies . . . [and] does not regulate foreign insurance policies, or control the substantive conduct of a foreign insurer, or otherwise affect the 'business of insurance'

in any other country." *Id.* at 746.

Under the "law of the case" doctrine a decision of the court in a prior appeal must be followed in all subsequent proceedings in the same case. *Eichman v. Fotomat Corporation*, 880 F.2d 149, 157, (citing *Waggoner v. Dallaire*, 767 F.2d 589, 593 (9th Cir. 1985)), *cert. denied*, 475 U.S. 1064, 89 L. Ed. 2d 601, 106 S. Ct. 1374 (1986). This rule applies unless the first decision is clearly erroneous and would result in manifest injustice, an intervening change in the law has occurred, or the evidence on remand is substantially different. *Id.* It applies even where the first panel's holding was "cryptic and somewhat ambiguous." *Hanna Boys Ctr. v. Miller*, 853 F.2d 682, 687 (9th Cir. 1988); *see also Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817, 100 L. Ed. 2d 811, 108 S. Ct. 2166 (1988) (the relevant inquiry on a law of the case question is whether a court previously decided an issue, not whether, or how well it explained the decision); and *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1392 (9th Cir. 1995) (even issues treated summarily, without detailed explanation or analysis, become the law of the case).

While affirming this court's grant of plaintiffs' motion for a preliminary injunction, the Ninth Circuit ruled as follows:

> We hold that the district court erred when it decided that HVIRA violates the dormant Commerce Clause and the foreign affairs power. However, because the district court has not addressed Plaintiffs' claim that HVIRA violates the Due Process Clause, we leave the preliminary injunction in place and remand for further proceedings.

Gerling v. Low, 240 F.3d at 754.

As for the question of which legal issues remain open, the Court of Appeals in this case was quite explicit. It unambiguously intended to close the questions of HVIRA's constitutionality under the Commerce Clause or Foreign Affairs Power, but, just as clearly, it intended to leave open the

question of whether the statute violates the Due Process Clause.

Defendant cites *Eichman*, 880 F.2d at 157, for the proposition that the law of the case doctrine encompasses both "a court's explicit decisions" and those "decided by necessary implication" and therefrom argues that the Ninth Circuit's prior ruling disposes of all of plaintiffs' claims, including the Due Process claims. Given its affirmation of the preliminary injunction and the specific language of its remand, the Ninth Circuit's opinion in this case cannot reasonably be read to "necessarily imply" that plaintiffs' due process claims are foreclosed.

For their part, plaintiffs contend that the Ninth Circuit's legal rulings should be given no weight at all on summary judgment because plaintiffs' pending Supreme Court certiorari petition renders the Commerce Clause and Foreign Affairs Power arguments unripe for decision. Plaintiffs argue that "no purpose would be served by entering judgment on these claims, only to have the Supreme Court grant certiorari in October and reverse the Ninth Circuit on the merits." This court, however, is bound by existing rulings of the Ninth Circuit unless and until they are withdrawn or overturned; justice is not served by the type of speculative delay plaintiffs advocate.

Defendant's argument that certain factual findings are also the law of the case requires a slightly different analysis. Defendant's argument focuses on the Ninth Circuit's finding that HVIRA does not regulate foreign insurance policies, control the conduct of foreign insurers, or otherwise affect the "business of insurance" in foreign countries. *Gerling v. Low*, 240 F.3d at 746. This was a factual finding made in a "foreign commerce" context during an interlocutory appeal of a preliminary injunction. Findings on interlocutory appeals of preliminary injunctions do not generally constitute "law of the case". *City of Angoon v. Hodel*, 803 F.2d 1016, 1024 n.4 (9th Cir. 1986) (citations omitted).

The basis for distinguishing between factual findings made

on direct appeal and factual findings made on interlocutory appeal of a preliminary injunction is that "the standard of review for factual determinations on direct appeal is higher than the standard applied during an interlocutory appeal of a preliminary injunction." *Royal Insurance Co. v. Quinn-L Capital Corp.*, 3 F.3d 877, 881 (5th Cir. 1993). Where, as here, a factual finding (i.e., that a statute regulates foreign conduct) did not survive the lower standard of review, it is arguably unlikely that the same or similar finding would have survived or will survive the higher standard of review applied by the same court on direct appeal. This reasoning weighs in favor of applying the law of the case doctrine to all of the Court of Appeals' findings.

There are, however, likely to be contextual distinctions when a proposed factual finding is analyzed under or applied to disparate constitutional claims. Consequently, this court does not read the Ninth Circuit's opinion in this case to preclude plaintiffs from arguing that HVIRA regulates extraterritorially for the purposes of making their due process arguments. No aspect of plaintiffs' due process argument is now foreclosed by the "law of the case" doctrine.

B. *Due Process*

The Ninth Circuit left the preliminary injunction in place and specifically remanded to this court for consideration of the constitutionality of HVIRA under the Due Process Clause. All plaintiffs now challenge the statute on two due process grounds: (1) that it is an extraterritorial regulation enacted in excess of the state's legislative jurisdiction; and (2) that it mandates the performance of impossible tasks and provides for automatic license revocation upon non-performance.

1. *Whether HVIRA Violates Due Process Because it Was Enacted in Excess of California's Legislative Jurisdiction*

Plaintiffs argue that HVIRA violates the Due Process Clause because it was enacted in excess of California's

legislative jurisdiction. Defendant counters that, as a mere "licensing and reporting statute," HVIRA is a proper exercise of California's legislative jurisdiction.[5]

"Legislative jurisdiction" is a concept that courts have applied to describe the due process limits on the legislative power of a state. It is a concept employed to "determine the extraterritorial reach of a statute." *Adventure Communications Inc. v. Kentucky Registry of Election Finance*, 191 F.3d 429, 435 (4th Cir. 1999) (quoting *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813, 125 L. Ed. 2d 612, 113 S. Ct. 2891 (1993) (Scalia, J., dissenting)). Like other jurisdictional doctrines, legislative jurisdiction is a threshold question. Applying guidelines similar to those used to determine personal jurisdiction, it requires that a state must have a significant contact or significant aggregation of contacts, creating state interests, such that application of its law is neither "arbitrary nor fundamentally unfair." *Adventure Communications*, 191 F.3d at 436-37 (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13, 66 L. Ed. 2d 521, 101 S. Ct. 633 (1981)).

While noting that "it is possible that HVIRA violates the Due Process Clause," the Ninth Circuit made specific reference to *Gerling Global Reins. v. Nelson*, 123 F. Supp. 2d 1298 (N.D. Fla. 2000), a recent Florida district court case that invalidated a Holocaust-era insurance statute on legislative jurisdiction grounds. The distinctions between Florida's statute and California's HVIRA are illustrative of the purpose and effect of the legislative jurisdiction doctrine.

Florida's "Holocaust Victims Insurance Act," § 626.943, Fla. Stat. (1999), like California's HVIRA, requires insurers doing business in Florida to provide extensive information to

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[5] Plaintiffs [sic] also argue that "since the HVIRA does not regulate extraterritorially, plaintiff's legislative jurisdiction claims fail as a matter of law." For reasons discussed above, however, the court rejects defendant's contention that plaintiffs' legislative jurisdiction arguments are precluded by the law of the case doctrine.

the Florida Department of Insurance regarding policies issued to Holocaust victims by the insurers themselves or by any "parent, subsidiary, or affiliated company." § 626.9543(3)(d) & (7), Fla. Stat. (1999). The Florida statute also requires, however, that insurers actually pay claims on those policies, if such claims are established under a "reasonable, not unduly restrictive, standard of proof." § 626.9543(5)(b), Fla. Stat. (1999). Moreover, through its implementing regulations, it requires insurers doing business in Florida to pay not only their own claims but also to pay claims against any parent, subsidiary or corporate affiliate. *See* Rule 4-137.010(6), Fla. Admin. Code.

The Florida statute plainly attempted to exercise jurisdiction over the specific enforcement of European insurance contracts. In fact, the Florida Insurance Commissioner did not even try to justify the statute as a "means of determining whether plaintiffs themselves or their officers are fit to engage in the business of insurance in Florida," but instead acknowledged to the Nelson court that the statute's goal was to "bring about payment of amounts due." *Nelson*, 123 F. Supp. 2d 1298, 1303 n.9. Not surprisingly, the Nelson court held that "the efforts of the State of Florida to reach transactions entered in Germany between German parties having no connection with Florida are beyond the state's jurisdiction." *Id.* at 1304.

Plaintiffs in this case argue that "similar legislative findings" preceded enactment of the California and Florida statutes. Those similarities, however, do not overcome the differences in the actual language and effect of the two statutes. Florida's statute is a far more direct attempt to "regulate extraterritorially," as contemplated by the legislative jurisdiction doctrine, than is HVIRA. Most notably, HVIRA lacks any mandate requiring insurers to actually pay claims. Plaintiffs have not established that HVIRA violates due process because it was enacted in excess of the state's legislative jurisdiction. Plaintiffs' motion for summary judgment on that

ground must therefore be denied.

2. *Whether HVIRA Violates Due Process Because it Mandates the Performance of Impossible Tasks and Provides for Automatic License Revocation upon Non-Performance*

   a. *Whether a license to do business as an insurer is a protected property interest for purposes of a Fourteenth Amendment analysis.*

The "threshold requirement to a substantive or procedural due process claim is the plaintiff's showing of a liberty or property interest protected by the Constitution." *Board of Regents v. Roth*, 408 U.S. 564, 569, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972); *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994); *Kraft v. Jacka*, 872 F.2d 862, 866 (9th Cir. 1989). Courts have long wrestled with the question of exactly what "interests" the Fourteenth Amendment protects. Trying to define the constitutional concepts of "property interest" and "due process," early U.S. Supreme Court decisions looked back as far as the signing of the Magna Carta, "when the great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the crown." *Davidson v. New Orleans*, 96 U.S. 97, 102, 24 L. Ed. 616 (1877). More recently, we have recognized that our definition of a Fourteenth-Amendment-protected property interest is rooted in the idea that our property interests provide our "sources of security." *See Goldberg v. Kelly*, 397 U.S. 254, 263 n.8, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970) (quoting Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245, 1255 (1965)).

For decades now, courts have recognized protected property interests in many forms which fall outside the norm of common-law property. *See e.g. Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976) (individual's interest

in continued receipt of social security benefits is a statutorily-created property interest for purposes of a due process analysis); and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999) (the rights of a party under a patent are a protected property interest for purposes of a due process analysis). Indeed, the Supreme Court has made it abundantly clear that "the property interests protected by due process extend well beyond actual ownership of real estate, chattels, or money." *Roth*, 408 U.S. at 571-72 (citing *Connell v. Higginbotham*, 403 U.S. 207, 208, 29 L. Ed. 2d 418, 91 S. Ct. 1772 (1971)).

Courts have also long recognized that licenses which enable one to pursue a profession or earn a livelihood are protected property interests for purposes of a Fourteenth Amendment analysis. "Once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Bell v. Burson*, 402 U.S. 535, 29 L. Ed. 2d 90, 91 S. Ct. 1586 (1971) (addressing suspension of drivers' licenses). The Ninth Circuit has specifically recognized that an existing license, in contrast to an applied-for license, constitutes a legitimate entitlement of which one cannot be deprived without due process. *See Greenwood v. Federal Aviation Administration*, 28 F.3d 971, 975 (9th Cir. 1994) (addressing suspension of pilot's license).

The Commissioner nonetheless advances the argument that doing business as an insurer in California is a "mere privilege" which, he argues, can be summarily withdrawn for "any legitimate reason" the State chooses, divines or fashions. Categorizing plaintiffs' licenses as "privileges" bestowed by the state does not immunize their suspension from a due process challenge. The Supreme Court has specifically

"rejected the concept that constitutional rights turn upon whether a government benefit is characterized as a 'right' or as a 'privilege'." *Graham v. Richardson*, 403 U.S. 365, 374, 29 L. Ed. 2d 534, 91 S. Ct. 1848 (1971). An existing license to do business as an insurer in California is a property interest deserving of Fourteenth Amendment protection. Any action to suspend such a license must therefore be taken in conformity with the requirements of procedural due process.

b. Ripeness of plaintiff's procedural due process challenge

"Ripeness is peculiarly a question of timing." *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 580, 87 L. Ed. 2d 409, 105 S. Ct. 3325 (1985). "Its basic rationale is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Id.* In considering whether a case is ripe for review, a court must evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration. *Winter v. California Med. Review, Inc.*, 900 F.2d 1322, 1325 (9th Cir. 1990).

"The critical question concerning fitness for review is whether the claim involves uncertain and contingent events that may not occur as anticipated or may not occur at all." 15 Moore's Fed. Practice, § 101.76[1][a] (3d ed. 1999); *see also Union Carbide*, 473 U.S. at 580-81 (noting that a central component of the fitness for review factor is whether the motion involves uncertain or contingent future events that may never occur.) Though a procedural due process challenge here might theoretically be susceptible to the argument that it will not ripen until plaintiffs have actually been deprived of their protected property interest (i.e. until the Commissioner has made a final determination that plaintiffs' licenses should be suspended), the record in this case is now developed to the point that no legitimately unknown contingencies exist.

As for the second factor under *Winter*, all parties in this

case will suffer hardship if determination of the constitutionality of HVIRA is further delayed. Plaintiffs, in particular, know with absolute certainty that, if HVIRA takes effect, suspension of their licenses to do business as insurance companies in California will follow forthwith. Waiting for this harm to be suffered, not only by the companies themselves, but by all the citizens of California who are their customers and employees, serves no one. The court therefore concludes that the case is ripe for, and justice is best served by, a present determination of whether HVIRA survives a procedural due process challenge.

c. Procedural due process's meaningful hearing requirement

The court therefore turns to the question of whether HVIRA's procedures provide due process. "A procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case." *Burson, 402 U.S. at 540.* The procedural safeguards sufficient to protect one's interest in welfare benefits, for example, may not suffice when one faces a felony charge. *Compare Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970), with *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963). There are, however, certain longstanding bare minimum components to the right to procedural due process.

The opportunity to be heard "at a meaningful time and in a meaningful manner" is the fundamental requirement of procedural due process. *Mathews v. Eldridge*, 424 U.S. 319, 332, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 85 S. Ct. 1187 (1965)). For over one hundred years, our courts have held that due process of law requires "specific charges, due notice of such charges, an opportunity to make specific answers to them, an opportunity to cross-examine the witnesses in support of them, an opportunity to adduce testimony in contradiction of them, and an opportunity for argument upon the testimony and

upon the law and facts." *United States ex rel. Wedderburn v. Bliss*, 12 App. D.C. 485, 493 (1898). Thus, in order to satisfy due process' "meaningful hearing" requirement, the inquiry that is made must involve at least some assessment of fault or liability. *See Burson*, 402 U.S. at 539.

On its face, HVIRA makes no provision for any hearing whatsoever. Defendant argues that the statute's facial lack of a hearing provision does not render it unconstitutional because the right to a hearing must be "implied into" the statute itself in the absence of language to the contrary. *See Fascination Inc. v. Hoover*, 39 Cal. 2d 260, 246 P.2d 656 (1952).[6] The hearing that will be provided under HVIRA, to the extent that HVIRA contemplates a hearing at all, however, is not a meaningful hearing for the purposes of surviving a due process challenge. Defendant's position, supported by the plain language of the statute, is that an insurer's failure to produce documents, for any reason other than the fact that no documents exist, will trigger an immediate license suspension action. According to defendant, that action will take the form of a hearing before an administrative law judge. Leslie Tick's testimony and the statute itself make it clear that the administrative law judge is not permitted to exercise any discretion as to whether non-compliance might be excused or justified, or mitigated in any way that could affect the outcome of the hearing.

Thus, as both this court and the defendant interpret the statute, the same sole fact that triggers the suspension hearing

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[6] Defendant, having thus apparently conceded that plaintiffs would be entitled to a hearing, (indeed, having argued that a hearing is so obviously necessary as to be implied), later cites *Codd v. Velger*, 429 U.S. 624, 628, 51 L. Ed. 2d 92, 97 S. Ct. 882 (1977), for the proposition that "a hearing need not be provided when there are no factual issues in dispute." In other words, a hearing would be required in theory, but would not be required in application, because, here, there would be no facts to resolve. A statute that sustains such contrary reasoning in its defense, because it facially obviates any practical need for the impliedly-necessary and constitutionally-required hearing, must be a violation of due process.

will dictate its outcome. That cannot possibly amount to a meaningful hearing. Such a "hearing" is particularly meaningless where, as here, the same individual who decides to trigger the hearing makes the final determination of whether to suspend the license.[7] Under HVIRA, failure to produce the demanded records for any reason at all, even impossibility, effectively results in automatic license suspension. This is the deprivation of a protected property interest without due process of law.

Defendant contends that there are disputed issues as to whether plaintiffs, as they have asserted, actually lack the corporate authority to compel production of the demanded documents from their affiliates. Other than raising evidentiary objections to plaintiffs' declarations and making legal arguments about the meaning of the word "control," defendant has not presented any substantial evidence to create a triable issue of fact on the question of corporate control. Defendant also disputes, and asks this court to determine as a matter of law, whether foreign criminal and civil laws prohibit production of the information required by HVIRA.[8] On a procedural due process analysis, however, the question of whether plaintiffs could ultimately prove that it is impossible

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[7] Section 790.15 specifies that an action to suspend a certificate of authority under this section shall be conducted in accordance with the Administrative Procedure Act. That Act directs that the "agency" itself, in this case, the Commissioner, render the final decision. Cal. Govt. Code § 11517.

[8] Though the court declines to reach a conclusion of law as to whether German and/or Swiss laws prohibit plaintiffs' European affiliates from complying with HVIRA, the court notes that, other than making evidentiary objections, defendant has not presented evidence to refute the submitted position of the Swiss government as to the impact of Article 273 of the Swiss Penal Code. Moreover, if it were to reach the issue, this court would owe "substantial deference" to a foreign nation's interpretation of its own laws. *See In Re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992).

for them to comply with HVIRA does not control.[9] The fact that the statute *denies them the opportunity to be heard on that point*, or, for that matter, on any point, is what controls.

d. Whether the state's "licensure power" somehow obviates plaintiffs' entitlement to a meaningful hearing under procedural due process

Defendant argues that "California can rationally condition the privilege of doing business in the State" on strict compliance with HVIRA's disclosure requirements. Defendant persists in the position that the first, last, and only constitutional question in this case is the rational basis test. There are, however, other limitations on a state's power. The state cannot, for example, impose conditions on doing business in California which require relinquishment of constitutional rights. *See* generally Laurence H. Tribe, American Constitutional Law § 11.5 at 781 (2d ed. 1988) ("Independently unconstitutional conditions — those that make enjoyment of a benefit contingent on sacrifice of an independent constitutional right — are invalid."). *See also Barron v. Burnside*, 121 U.S. 186, 200, 30 L. Ed. 915, 7 S. Ct. 931 (1887) ("In all the cases in which this court has considered the subject of the granting by a state to a foreign corporation of its consent to do business in the state, it has uniformly asserted that no conditions can be imposed by the state which are repugnant to the Constitution."); *Terral* v. *Burke Constr. Co.*, 257 U.S. 529, 532-533, 66 L. Ed.

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[9] Plaintiff has submitted evidence which tends to show, at the least, that their affiliates believe compliance is unlawful and are refusing to provide the demanded documents. Recognition of impossibility as an excuse for non-performance is a long-standing tenet of our justice system. There are numerous cases which stand for the proposition that a sanction imposed for failing to produce information due to inability violates our notions of fundamental fairness and due process. *See e.g., Societe Internationale Pour Participations Indistrielles et Commerciales v. Rogers*, 357 U.S. 197, 212, 2 L. Ed. 2d 1255, 78 S. Ct. 1087 (1958); and *In re United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1369 (9th Cir. 1980).

352, 42 S. Ct. 188 (1922) ("The sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law."); and *Dolan v. City of Tigard*, 512 U.S. 374, 385, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994) (simply denominating governmental interest as "business regulation" does not immunize it from constitutional challenge).

At oral argument and in its papers, defendant specifically referred to California's Insurance Holding Company System Regulatory Act, ("IHCSRA"), arguing that it establishes that California has an existing, presumably constitutionally permissible, public policy of requiring insurance companies to report information pertaining to their foreign affiliates. Several ways in which this regulatory statute is distinguishable from HVIRA bear mention. First, it seeks significantly narrower information, related only to the affiliates' financial viability. Second, it specifically provides that the disclosed information shall be treated as confidential and shall not be made public by the Commissioner. Third, and most notably, it provides a forum within which insurers can present factual defenses to a failure to disclose "allegation" against them, and specifically dictates that an insurer will be given "notice and an opportunity to be heard" before the Commissioner acts to suspend, revoke, or refuse to renew a license for non-compliance with the disclosure requirements. *See* California Insurance Code § 1215 *et seq.* In short, IHCSRA is in many ways exactly what HVIRA is not. Its existence in no way establishes that HVIRA is constitutional, and it certainly does not support defendant's implied argument that the state's "licensure" power somehow trumps the requirements of procedural due process.

e. Conclusion

By providing that no state shall "deprive any person of life, liberty, or property without due process of law," the Fourteenth Amendment of our Constitution binds the fundamental

protections of life, liberty, and property together into one concept. We need look no further than the factual background of this case to understand why these three protections are so joined.

Ever since the Fourteenth Amendment was enacted in 1866, courts have struggled to define precisely what it means to protect our property interests with "due process." One tenet of this area of jurisprudence is clear, however: a state may not "make any thing due process of law" by merely declaring it to be so. *Davidson v. New Orleans*, 96 U.S. 97, 102, 24 L. Ed. 616 (1877). The power of a state is not unchecked, and it is not absolute. Neither does it become so, as the Commissioner has argued here, under the cloak of some "licensure" power. It does not even become so if the power is wielded out of the purest intention to somehow right one of humanity's wrongs, or to facilitate some amount of redress for the victimized.

By mandating license suspension for non-performance of what may be impossible tasks without allowing for a meaningful hearing, HVIRA deprives plaintiffs of a protected property interest without affording them due process of law. Plaintiffs' joint motion for summary judgment that the HVIRA is unconstitutional under the Due Process Clause must therefore be granted.

IV. *Other Grounds for Summary Judgment*

Plaintiffs have also argued that the statute is unconstitutional for various other reasons, including that it is unconstitutionally vague. Because the court finds that the statute violates the Due Process Clause, and because, following the guidance of the Ninth Circuit's remand, the parties have focused their development of the factual record on due process issues, the court does not reach the other constitutional challenges raised by plaintiffs.

Also, defendant moves for summary judgment on the ground that HVIRA is not constitutional [sic] for any other

reason raised in any plaintiffs' complaint.[10] Because the court finds that the statute is unconstitutional on due process grounds, the court need not render advisory opinions on defendant's arguments that the statute passes other constitutional tests. Defendant's motion for summary judgment will therefore be denied on the ground that the statute violates due process.

IT IS THEREFORE ORDERED that plaintiffs' motions for summary judgment upon the ground that HVIRA violates due process be, and the same hereby are, GRANTED. Defendant is hereby permanently enjoined from suspending the licenses of the plaintiffs to do business in California based on their failure to comply with the Holocaust Victim Insurance Relief Act and its accompanying regulations.

IT IS FURTHER ORDERED that defendant's motion for summary judgment upon the ground that HVIRA is not unconstitutional be, and the same hereby is, DENIED.

DATED: October 1, 2001

/s/ William B. Shubb

UNITED STATES DISTRICT JUDGE

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[10] Defendant's original moving papers addressed all of plaintiffs' constitutional challenges except the due process argument raised by the Generali plaintiffs concerning the Commissioner's allegedly unconstitutional "campaign" against Generali.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. Civ. S-00-0506 WBS JFM

GERLING GLOBAL REINSURANCE CORP. OF AMERICA, *et al.*, *Plaintiffs*,

v.

CHUCK QUACKENBUSH in his capacity as COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA, *Defendant*.

No. Civ. S-00-0613 WBS JFM

AMERICAN INSURANCE ASSOCIATION and AMERICAN RE-INSURANCE CO., *Plaintiffs*,

v.

CHUCK QUACKENBUSH in his capacity as COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA, *Defendant*.

No. Civ. S-00-0779 WBS JFM

WINTERTHUR INTERNATIONAL AMERICA INSURANCE CO., *et al.*, *Plaintiffs*,

v.

CHUCK QUACKENBUSH in his capacity as COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA, *Defendant*.

No. Civ. S-00-0875 WBS JFM

ASSICURAZIONI GENERALI S.p.A., *Plaintiff,*

v.

CHUCK QUACKENBUSH in his capacity as COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA, *Defendant.*

Filed: June 9, 2000

MEMORANDUM AND ORDER; PRELIMINARY INJUNCTION

In October 1999, California enacted the Holocaust Victim Insurance Relief Act ("HVIRA"). *See* Cal. Ins. Code §§ 13800-13807 and accompanying regulations, Cal. Code Regs. Tit. 10 §§ 2278-2278.5.[1] The stated purpose of the HVIRA is for insurance companies doing business in the State of California to ensure that "any involvement they or their related companies may have had with insurance policies of Holocaust victims are disclosed to the state and to ensure the rapid resolution of these questions, eliminating further victimization of these policyholders and their families." Cal. Ins. Code § 13801(e). Each set of plaintiffs has moved against defendant Chuck Quackenbush, the California Commissioner of Insurance, for a preliminary injunction against enforcement of the HVIRA and accompanying regulations on the grounds that they are unconstitutional and that such enforcement will cause plaintiffs

[1] Some of the plaintiffs use the term "HVIRA" to refer to all statutes related to California Insurance Code sections 13800-13807, including California Insurance Code section 790.15 and California Code of Civil Procedure section 354.5. In fact, the latter two sections were enacted before Insurance Code sections 13800-13807 and are not part of the HVIRA. When the court uses the term "HVIRA," it refers only to California Insurance Code sections 13800-13807 and the accompanying regulations.

irreparable harm. *See* Fed. R. Civ. P. 65.[2]

I. *Facts*

A. *The Statutes*

The disputed statutes and regulations relate to claims asserted by Holocaust victims or their heirs or beneficiaries for coverage under insurance policies issued in Europe between 1920-1945. After the National Socialist (NAZI) party came to power, it enacted a series of statutes authorizing governmental confiscation of Jewish property and other assets, including insurance proceeds. Under these NAZI statutes, German insurers were required to pay the proceeds of insurance policies of Jewish residents to "blocked accounts" controlled by the NAZI government. A 1943 statute ordered confiscation of the estates of deceased Jews. Further, although many Holocaust victims had insurance policies, many lost the papers during their imprisonment. In many cases, the persons most knowledgeable about the policy were killed, leaving heirs without a paper trail. As a result, many Holocaust victims and their descendants and heirs have never collected on insurance policies.

The HVIRA requires insurance companies doing business in California to file reports disclosing policies issued in Europe during the period 1920-1945. *See* Cal. Ins. Code §§ 13800-13807. Other statutes extend the statute of limitations for filing

[2] Gerling additionally moves for a preliminary injunction against enforcement of California Civil Procedure Code section 354.5 and California Insurance Code section 790.15. The court dismisses Gerling's motion as to these two claims. (*See* Order re: Motion to Dismiss, filed concurrently.) Hence, the court only considers the parties' motions for preliminary injunction against enforcement of the HVIRA.

Gerling also moves for summary judgment on the same claims discussed in its motion for preliminary injunction. Because discovery is incomplete, and defendant has not responded to that motion, the court does not consider it at this time. See Fed. R. Civ. P. 56(f).

such claims (Cal. Civ. Proc. Code § 354.5), and suspend the license of insurance companies who have not paid valid claims (Cal. Ins. Code § 790.15).

1. *California Insurance Code §§ 13800-13807 ("HVIRA")*

The HVIRA obligates insurers doing business in California to file reports identifying insurance policies (life, property, liability, health, annuities, dowry, educational, or casualty) sold to persons in Europe between 1920 and 1945 directly or through a "related company." Cal. Ins. Code § 13804(a). A "related company" is "any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer." Cal. Ins. Code § 13802(b). Specifically, the statute requires the insurer or related company to file with the registry: (1) the number of those insurance policies; (2) the holder, beneficiary, and current status of those policies; and (3) the city of origin, domicile, or address for each policy holder. *See* Cal. Ins. Code § 13804(a). Further, with regard to each policy, the insurer must certify one of the following: (1) that the proceeds of the policies have been paid to the designated beneficiaries or their heirs where that person or persons, after diligent search, could be located and identified; (2) that the proceeds where the beneficiaries or heirs could not, after diligent search, be located or identified, have been distributed to Holocaust survivors or to qualified charitable nonprofit organizations for the purpose of assisting Holocaust survivors; (3) that a court of law has certified in a legal proceeding resolving the rights of unpaid policyholders, their heirs, and beneficiaries, a plan for the distribution of the proceeds; or (4) that the proceeds have not been distributed and the amount of those proceeds. *See* Cal. Ins. Code § 13804(b).

Under the regulations, these reports were to be filed on or before April 7, 2000. *See* Cal. Code Regs. § 2278.4. Under the statute, if the reports were not filed by the 210th day after the HVIRA became effective (May 7, 2000), the Commissioner

"shall suspend the certificate of authority to conduct insurance business in the state . . . ." Cal. Ins. Code § 13806.[3]

2. *California Civil Procedure Code § 354.5*

Under this statute, any Holocaust victim or heir or beneficiary who resides in the state may bring a legal action to recover on any claim arising out of an insurance policy or policies purchased or in effect in Europe before 1945 from an insurer (defined term), "notwithstanding any other provision of law." Cal. Civ. Proc. Code § 354.5(b). Further, it forbids dismissal of any claim whether brought by a resident or nonresident on statute of limitations grounds as long as the action is commenced on or before December 31, 2010. *See* Cal. Civ. Proc. Code § 354.5(c)

3. *California Insurance Code § 790.15*

This statute modifies the Insurance Code to empower the Insurance Department of the State of California to suspend the license of an insurer admitted to do business in California if the Department concludes that an "affiliate" of the insurer has failed to pay any valid claim from Holocaust survivors.

B. *International Negotiations*

The federal government, along with foreign governments and insurance companies, is also grappling with the same goal of giving Holocaust victims some compensation for lost monies from insurance policies.

The United States and German governments have recently negotiated the formation of the Foundation for Remembrance, Responsibility, and the Future ("Foundation") funded by the German government and German corporations to resolve the claims of Holocaust victims. The Foundation is capitalized with

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[3] Defendant has represented that he will not attempt to enforce the statute against plaintiffs until 20 days after the motions for preliminary injunction have been heard.

approximately $5 billion dollars toward payments of victims of slave and forced labor, as well as payments on asserted claims related to insurance, banking, taking of property, and medical experiments. In a December 13, 1999 letter to Chancellor Schroeder, President Clinton stated that the executive agreement between the two countries shall state that the "Foundation should be regarded as the exclusive remedy for all claims against German companies arising out of the Nazi era." (American: Sullivan Decl. Ex. 6, 12/13/99 Clinton letter to Schroeder)[4] Deputy Secretary of the Treasury Stuart Eizenstat is the principal representative of the United States on these issues.

A second organization, the International Commission on Holocaust Era Insurance Claims ("ICHEIC"), chaired by former Secretary of State Lawrence Eagleburger, was established as a voluntary organization between European regulators, major European insurance companies, representatives of Jewish and Holocaust survivor organizations, Israel, and the National Association of Insurance Commissioners in the United States. Generali and the Winterthur plaintiffs are members.

The framework for the ICHEIC is set out in a Memorandum of Understanding ("MOU"). Among other things, the MOU provides that the ICHEIC shall conduct an investigatory process to determine the current status of insurance policies issued to Holocaust victims for which claims are filed with the ICHEIC and shall establish a claims process to settle and pay individual claims. (American: Sullivan Decl. Ex. 13, MOU). Eizenstat told the House Banking Committee that "[t]he U.S. Government has supported the International Commission on Holocaust Era Insurance Claims since it began, and we believe it should be considered the exclusive remedy for

[4] Many of the exhibits appear in some or all of the various plaintiffs' papers. The court will only cite to one location of each exhibit.

resolving insurance claims from the World War II era." (Winterthur: Grimm Decl. Ex. I, Eizenstat 2/9/00 at House Banking Committee hearing).[5] It is expected that the German Foundation will recognize the ICHEIC as the exclusive mechanism for resolving insurance claims. (Winterthur: Grimm Decl. Ex. I, Eizenstat 2/9/00 at House Banking Committee hearing).[6]

C. *The Parties*

Plaintiffs in all four cases are insurance companies licensed to do business in California. Each set of plaintiffs alleges that the statutes are unconstitutional. In all four cases, defendant is Chuck Quackenbush in his capacity as the Commissioner of Insurance of the State of California.

[5] Defendant objects that Eizenstat's statement lacks foundation and is inadmissible hearsay. At the preliminary injunction stage, however, the court may consider hearsay. "The urgency of obtaining a preliminary injunction necessitates a prompt determination and makes it difficult to obtain affidavits from persons who would be competent to testify at trial. The trial court may give even inadmissible evidence some weight, when to do so serves the purpose of preventing irreparable harm before trial." *Flynt Distrib. Co., Inc.* v. *Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984). Consequently, the court does not discuss each of defendant's evidentiary objections.

[6] The plaintiffs also discuss a 1995 agreement between the United States and Germany to "settle compensation claims by certain United States nationals who suffered loss of liberty or damage to body or health as a result of National Socialist measures of persecution directly against them." This agreement provided for two separate payments by Germany in settlement of the claims. In return for the payments by the German government, the United States "declare[d] all compensation claims against the Federal Republic of Germany by United States nationals for damage within the meaning of [the Agreement] to be finally settled." This Agreement, although related in topic, is not directly applicable because it deals with claims against Germany, not against insurance companies, and does not appear to involve insurance claims.

1. *Gerling Global Reinsurance Corporation of America ("Gerling")*

Plaintiffs are five insurance companies licensed to do business in California. They are "related to" or "affiliated" with two German companies (Gerling-Konzern Allgemenine Versicherungs-AG ("GKA") and Gerling-Konzern Lebensversicherungs-AG ("GKL") that issued policies in Europe during the proscribed time period. Hence, they have to file reports. Gerling alleges that the HVIRA is unconstitutional under: (1) the constitutional grant of authority to the federal government over foreign affairs; (2) the Commerce Clause; (3) the Due Process Clause; (4) Bill of Attainder; (5) the Fourth Amendment; and (6) the Contracts Clause.

2. *American Insurance Association and American Re-Insurance Co. (together, "American")*

Plaintiffs are American Insurance Association ("AIA") and American Reinsurance Company ("AmRe"). AIA principally represents American insurance companies that did not issue insurance policies in Europe during the relevant period and do not own or control any companies that did.[7] Five members of AIA are related to European companies that issued the applicable policies. AmRe is a large insurance company licensed to do business in California. AmRe claims that neither it, nor any subsidiary or affiliate over which it has control, issued insurance policies that were in effect in Europe during 1920-1945.

American claims that the statutes are unconstitutional for three reasons: (1) the HVIRA treads on the federal government's exclusive power to conduct foreign relations; (2) the HVIRA violates the Foreign Commerce Clause; and (3) the HVIRA violates the Due Process clause.

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[7] Assicurazioni Generali, a European Company, is also represented by American Insurance, but files its own motion for preliminary injunction.

3. *Winterthur International American Insurance Co., et al. (together, "Winterthur")*

Plaintiffs are nine insurance companies licensed to do business in California. None of the companies ever issued insurance policies in Europe during the applicable time period, though each is "related" to such a company. Each plaintiff claims, however, that it is not in possession, custody, or control of any records pertaining to insurance companies sold by "related companies."

Winterthur argues that the HVIRA is unconstitutional because: (1) it is an unconstitutional invasion of the federal government's foreign affairs power; (2) it violates the Dormant Commerce Clause; (3) it violates the Due Process Clause; (4) it deprives plaintiffs of rights secured by the Equal Protection Clause; (5) it is an unconstitutional bill of attainder; and (6) implementation constitutes an unreasonable search and seizure.

4. *Assicurazioni Generali, S.p.A ("Generali")*

Generali is an Italian insurance company that issued insurance policies in Europe during the applicable time period. Generali is represented by the AIA, but has filed separately because it claims that the Insurance Commissioner has singled it out for attack, even though it has been paying insurance claims from Holocaust victims for the last several years.

Generali claims the HVIRA unconstitutionally violates the Due Process and Commerce Clauses and invades the foreign affairs power of the federal government.

D. *Threatened Enforcement*

The Commissioner has actively threatened enforcement against all plaintiffs. He subpoenaed many insurance companies, including plaintiffs and those represented by plaintiffs, to appear at a hearing on December 1, 1999. At the hearing, Quackenbush informed the insurance companies, "[t]his issue will be resolved in California. I promised that for

the last two years. And on April 6th, you're going to see just how serious California is if you have not complied with this law." (Generali: Tiberini Decl., Ex. 10, Transcript of 12/1/99 Investigatory Hearing, 14:16-20). He told Generali specifically, "I want you to take back to your officers in Italy and everywhere else, that you might want to consider seriously leaving the State, because it's obvious to me right now that you have no intention of complying with the law." (Generali: Tiberini Decl., Ex. 10, Transcript of 12/1/99 Investigatory Hearing, 49:12-16). At the end of questioning Generali, Quackenbush stated generally, "it is your choice now whether you're going to work with this Department of Insurance to bring your company in full compliance, whether you're going to leave the state voluntarily, or whether I'm going to kick you out. That's your three choices." (Generali: Tiberini Decl., Ex. 10, Transcript of 12/1/99 Investigatory Hearing, 51:19-23).

II. *Standard*

"To obtain a preliminary injunction, a party must establish either: (1) probable success on the merits and irreparable injury, or (2) sufficiently serious questions going to the merits to make the case a fair ground for litigation with the balance of hardships tipping decidedly in the movant's favor." *See Baby Tam & Co.* v. *City of Las Vegas*, 154 F.3d 1097, 1100 (9th Cir. 1998). These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. *See id.* The movant has the burden of proving each element of either test. *See Prescott* v. *County of El Dorado*, 915 F. Supp. 1080, 1084 (E.D. Cal. 1996).

Under the doctrine of *Ex Parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908), it is appropriate for a party to move for a preliminary injunction in federal court against state officers "who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal

Constitution . . . ." *Id.* at 156. A preliminary injunction is particularly appropriate when the moving party is faced with a "Hobson's choice" of continuing to violate the law, thus exposing itself to huge liability, or to "violate the law once as a test case and suffer the injury of obeying the law during the pendency of the proceedings and any further review." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 381, 119 L. Ed. 2d 157, 112 S. Ct. 2031 (1992).

III. *Probability of Success on the Merits*

Among them, the various plaintiffs make seven claims regarding the constitutionality of the statutes. They claim that the statutes violate: (1) the constitutional grant of authority to the federal government over foreign affairs (all parties); (2) Commerce Clause (all parties); (3) the Due Process Clause (all parties); (4) Bill of Attainder (Gerling and Winterthur); (5) the Fourth Amendment (Gerling and Winterthur); (6) the Contracts Clause (Gerling); and (7) Equal Protection (Winterthur). The court finds that plaintiffs have established a probability of success under the foreign affairs doctrine and the Commerce Clause. Accordingly, the court limits its analysis to these claims, and it is unnecessary to address the other claims.

A. *Foreign Affairs*

The framers of the Constitution made clear that the federal government was to have supreme power in the general field of foreign affairs. *See Hines* v. *Davidowitz*, 312 U.S. 52, 62, 85 L. Ed. 581, 61 S. Ct. 399 (1941). James Madison, in addressing the people of the State of New York, explained that the proposed Constitution contained a "class of powers, lodged in the general government, consist[ing] of those which regulate the intercourse with foreign nations . . . . This class of powers forms an obvious and essential branch of the federal administration. If we are to be one nation in any respect, it clearly ought to be in respect to other nations." Madison, *The Federalist Papers*, No. 42. Alexander Hamilton wrote, regarding the power of the federal judiciary over laws which

involve the peace of the confederacy: "the peace of the WHOLE ought not be left at the disposal of a PART. The Union will undoubtably be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever be accompanied with the faculty of preventing it." Hamilton, *The Federalist Papers*, No. 80.[8]

The Supreme Court has clarified the federal government's control over foreign affairs. "The Constitution entrusts [the nation's foreign affairs and international relations] solely to the Federal Government." *Zschernig* v. *Miller*, 389 U.S. 429, 436, 19 L. Ed. 2d 683, 88 S. Ct. 664 (1968). "Power over external affairs is not shared by the States; it is vested in the national government exclusively." *United States* v. *Pink*, 315 U.S. 203, 233, 86 L. Ed. 796, 62 S. Ct. 552 (1942). "Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Hines*, 312 U.S. at 63.

Zschernig is the most recent case addressing the issue of foreign affairs. This case involved an Oregon probate law that conditioned inheritance rights of a nonresident alien upon the alien's ability to demonstrate that his country of origin would grant reciprocal rights to a U.S. citizen and would not confiscate any of the inherited property. *See Zschernig*, 389 U.S. at 430-431. The Court held that the statute "affect[ed] international relations in a persistent and subtle way," *id.* at 440, had "great potential for disruption or embarrassment," *id.* at 435, and had "more than some incidental or indirect effect in foreign countries," *id.* at 434. Thus, the statute intruded into "matters which the Constitution entrusts solely to the Federal

[8] *See also The Federalist Papers* Nos. 3, 4. Here, John Jay discusses the importance of the national government in relation to keeping the peace with foreign powers.

Government." *Id.* at 436.[9]

1. *The HVIRA's Goal is International in Nature*

The stated goal of the HVIRA is to exercise a power exclusively entrusted to the national government. The statute states that "this chapter is necessary to . . . encourage the development of a resolution to these [insurance claim] issues through the international process or through direct action by the State of California, as necessary." Cal. Ins. Code § 13801(f). Encouraging resolution through an international process clearly implicates matters of foreign affairs, and, as such, is a function vested in the national government.

2. *Effects on International Relations and Potential for Disruption and Embarrassment*

Plaintiffs have demonstrated a probability that the HVIRA affects international relations. The United States federal government has been actively involved in compensating Holocaust victims since the end of World War II. In 1952, the United States was a party to a treaty among France, England, the United States, and Germany transferring to the Federal Republic of Germany the responsibility for implementing reparations. "The Federal Republic [of Germany] acknowledges the obligation to assure . . . adequate compensation to persons persecuted for their political convictions, race, faith or ideology, who thereby have suffered damage to life, limb, health, liberty, property, their possessions

[9] The First Circuit applied and interpreted *Zschernig* in *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), cert. granted, 120 S. Ct. 525 (1999). There, the First Circuit declared unconstitutional a Massachusetts law which restricted the ability of Massachusetts and its agencies to purchase goods or services from companies that do business with Burma. *See id.* The First Circuit held that the law had "more than an incidental or indirect effect in foreign countries," *Natsios*, 181 F.3d at 52 (quoting *Zschernig*, 389 U.S. at 434), and a "great potential for disruption or embarrassment" as evidenced by the protests of America's trading partners, 181 F.3d at 54 (quoting *Zschernig*, 389 U.S. at 435).

or economic prospects (excluding identifiable property subject to restitution)." (Gerling: Appendix of Authorities, Ex. A, Transition Agreement, Ch. 4 ¶ 1). Since that treaty, the United States has been actively involved in Holocaust victims compensation efforts. The HVIRA has a strong potential of interfering with these efforts.

First, the HVIRA has the real potential of frustrating the United States' efforts in negotiating the German Foundation. This Foundation, capitalized at close to $5 billion, will provide payments to victims of slave and forced labor as payments on asserted claims related to insurance, banking, taking of property, and medical experiments. On December 17, 1999, Secretary of the Treasury Stuart Eizenstat, the Special Representative of the Secretary of State and the President on Holocaust-Related Issues Senate Foreign Relations Committee, stated that "in the context of a comprehensive German Foundation, in all cases, consensual and non consensual, brought against German companies for claims arising out of the Nazi-era, we are prepared to say that the German Foundation should be regarded as the exclusive remedy and that dismissal of such cases would be in our foreign policy interests." (American: Sullivan Decl. Ex. 11, 12/17/99 Press Release).[10] The German Foundation cannot be the exclusive remedy if California's HVIRA is also applicable.

Second, the HVIRA has a potentially negative effect on the ICHEIC, which is a voluntary organization of European regulators, major European insurance companies, representatives of Jewish and Holocaust survivor organizations, Israel, and the National Association of Insurance Commissioners in the United States insurance companies. The ICHEIC investigates Holocaust era insurance policies and helps settle claims. Eizenstat wrote Quackenbush in November 1999

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[10] Defendant argues that the German Foundation is not in place, and thus is not a federal policy. However, the very negotiation for a German Foundation dedicated toward compensation implicates foreign policy.

that the HVIRA "has the unfortunate effect of damaging the one effective means now at hand to process quickly and completely unpaid insurance claims from the Holocaust period, the International Commission on Holocaust Era Insurance Claims . . . ." (American: Sullivan Decl. Ex. 24, 11/30/99 Eizenstat letter to Quackenbush). Further, Eizenstat informed Quackenbush, "you should know that actions by California, pursuant to this law, have already threatened to damage the cooperative spirit which the International Commission requires to resolve the important issue for Holocaust survivors." (American: Sullivan Decl. Ex. 24, 11/30/99 Eizenstat letter to Quackenbush). Eizenstat wrote Governor Davis on the same day, stating, "actions by California, pursuant to this law, have already potentially damaged and could derail both a settlement of forced and slave labor negotiations and the progress already achieved by the International Commission on Holocaust Era Insurance Claims . . . ." (American: Sullivan Decl. Ex. 23, 11/30/99 Eizenstat letter to Governor Davis).

Former Secretary of State Lawrence Eagleburger, the chair of the ICHEIC, testified that he believes that under the terms of the MOU under which the ICHEIC was organized, each insurance company that signed the MOU and is fully cooperating in the ICHEIC process "is entitled to receive, and should receive," an exemption from the enforcement of legislation such as the HVIRA. (Winterthur: Eagleburger Decl. ¶ 12). Section 10 of the MOU requires signatories to "work to achieve exemptions from related pending and future legislation . . . for those insurers that become signatories to this MOU and which fully cooperate with the processes and funding of the IC." (Winterthur: Eagleburger Decl. Ex. A.). ICHEIC members include plaintiffs Winterthur and Generali.

Third, the HVIRA potentially conflicts with the January 29, 2000 Joint Statement issued by the United States and Swiss governments at the inaugural meeting establishing the Swiss-US Joint Economic Commission ("Joint Statement"). Specifically, in the Action Plan attached to the Joint Statement,

the United States government promised to "call on the U.S. State insurance Commissioners and State legislative bodies to refrain from taking unwarranted investigative initiatives or from threatening or actually using sanctions against Swiss insurers." (Winterthur: Thalmann Supp. Decl. Ex. A, Joint Statement Action Plan at 3).

Finally, the HVIRA potentially conflicts with the national goal of creating "enduring legal peace." Eizenstat referred to this goal in his November 30, 1999 letter to Governor Davis. With regard to the German Foundation, Eizenstat stated, "clearly, for this deal to work . . . German industry and German government need to be assured that they will get 'legal peace', not just from class-action lawsuits, but from the kind of legislation represented by the California Victim Insurance Relief Act." (American: Sullivan Decl. Ex. 23, 11/30/99 Eizenstat letter to Governor Davis). President Clinton and Secretary of State Madeline Albright each echoed this sentiment several weeks later as the negotiations for the German Foundation began to close. President Clinton, in a December 13, 1999 letter to Chancellor Schroeder, wrote that "the Foundation should be regarded as the exclusive remedy for all claims against German companies arising out of the Nazi era. [The executive agreement] will state further that both our countries desire all embracing and enduring legal peace to advance our foreign policy interests." (American: Sullivan Decl. Ex. 6, 12/13/99 Clinton letter to Schroeder). Albright, when addressing the Slave Labor Meeting in Berlin on December 17, 1999 stated in relation to the German Foundation that "[t]he United States is agreeing to assist in providing legal peace to German companies, both in our courts and from state and local action. To succeed in achieving legal peace, it is essential that the Foundation be comprehensive." (American: Sullivan Decl. Ex. 9, 12/17/99 Albright remarks).

By conflicting so directly with the national government's policies and promises, the HVIRA not only affects international relations, but also has "great potential for disruption or

embarrassment." *See* Zschernig, 389 U.S. at 435. The HVIRA is inconsistent with Eizenstat's statements regarding the German Foundation as the exclusive remedy for claims from the Nazi era. It conflicts with the cooperative spirit of the ICHEIC, which the United States supports. The HVIRA makes the United States' promises in the U.S.-Swiss Joint Economic Statement appear to be unfulfilled. Finally, "legal peace" cannot be achieved if California and each of the other states are free to enact their own legislation forcing companies to report insurance policies or lose their license. *See* Cal. Code Ins. §§ 13800-13807.

Defendant argues that plaintiffs "have not demonstrated that the Holocaust Statutes have an actual direct impact on foreign relations. Indeed, plaintiffs cannot point to any federal policy enactments that the Holocaust Statutes must give way to." (Opp'n. at 84). Defendant then cites to the declarations of Robert Brown, the representative of the Minister of Israeli Society in the World Jewish Community, Linda Gerstel, a shareholder in a law firm representing Holocaust victims in class action insurance cases, and Leslie Tick, staff counsel to the Department of Insurance, and an attorney for defendant.[11] Brown states that he took part in the negotiations of the German Foundation settlement and claims that he does "not believe that the [HVIRA] interfered with the negotiations of the Germany Foundation settlement." (Opp'n.: Brown Decl. ¶ 6). Gerstel testified that she participated in the German Foundation negotiations and states that "nothing in the negotiations . . . was intended to effect or nullify the powers of the State Insurance Commissioners or any related regulatory scheme including, but not limited to, legislation enacted in California." (Opp'n.: Gerstel Decl. ¶ 7). Tick described the formation of the ICHEIC and its work. Defendant has not made clear which portion of

[11] Plaintiffs object on numerous grounds to parts of all three declarations. Because the court does not rely on the declarations, the court does not address the objections.

her lengthy declaration and exhibit supports defendant's claim.

Defendant's argument is wholly unpersuasive. First of all, as discussed above, several policy makers in the Executive Branch have clearly stated the United States' position with regard to the compensation of Holocaust victims. The fact that several participants in the German Foundation negotiations stated that they do not think that negotiations were compromised by the California statutes is irrelevant. The German Foundation negotiations are simply an illustration of potential foreign affairs that could be affected by the HVIRA. In any case, even if the HVIRA did not actually affect the negotiations, it certainly has the potential to affect foreign affairs *and* it is embarrassing to the United States to have individual states enacting legislation inconsistent with Executive promises and negotiations. *See Zschernig*, 389 U.S. at 435. Thus, the HVIRA interferes with the national government's exclusive power over external affairs. *See Pink*, 315 U.S. at 233.

Second, there does not have to be a formally stated national policy in order for a state to impermissibly interfere with foreign affairs. Under *Zschernig*, a state statute that affected international relations in "a persistent and subtle way" was held unconstitutional for impacting the federal government's foreign affairs powers. *Zschernig*, 389 U.S. at 440.

Finally, defendant's argument confuses the preemption doctrine with the foreign affairs power. A state cannot pass statutes that interfere with foreign affairs whether or not the national government has a stated policy. *See Pink*, 315 U.S. at 233 ("Power over external affairs is not shared by the States; it is vested in the national government exclusively.")

Defendant cites to *Clark* v. *Allen*, 331 U.S. 503, 91 L. Ed. 1633, 67 S. Ct. 1431 (1947), in support of his argument that plaintiffs must articulate a specific national policy violated by the HVIRA. *Clark*, however, does not stand for such a proposition. In *Clark*, the Supreme Court held that, generally,

rights to succession are determined by local law. However, those rights may be affected by an overriding federal policy. *See id.* at 517. In *Clark*, the Court did not find an overriding federal policy, nor did the Court find that the statute had anything more than an "incidental and indirect effect in foreign countries." *See id.* Therefore, the statute did not impermissibly intrude on foreign affairs powers. *Clark* did not require that there be an overriding federal policy. The Supreme Court simply found that there was none.

Defendant further argues that the German Foundation and the ICHEIC are not as comprehensive as the HVIRA with regard to reporting. Defendant points out that the German Foundation does not have a reporting requirement and that the ICHEIC, as a voluntary organization, does not encompass all the insurance companies addressed by the HVIRA. These assertions may be true. However, foreign affairs remains the province of the national government; the states do not have authority to fill in perceived gaps in international measures as they see fit. The United States must be able to speak with one voice on matters of international concern.

3. *More than an Incidental Effect on Foreign Countries*

Defendant argues that the effect is on foreign companies, not foreign governments, and thus the HVIRA does not violate the foreign affairs policy. The language of *Zschernig* requires that the statute have "more than some incidental or indirect effect in foreign *countries*," not foreign governments. *Zschernig*, 389 U.S. at 434. "Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted by a government." *Zschernig* 389 U.S. at 441 (quoting *Hines* 312 U.S. at 64).

Plaintiffs have demonstrated a probability of success in showing that the HVIRA has more than some incidental effect in foreign countries. In addition to the interference with foreign

commerce and the interference with foreign relations, the immediate effect of the statute is to require foreign companies to do an extensive search of warehouses and then compile a massive report, even if the company's only connection with California is through a subsidiary.

Plaintiffs have also raised a serious issue that the statutes are in conflict with some European Privacy laws. For example, in its Amicus brief, the Federal Republic of Germany argues that the disclosure of information and documentation by German insurers to the California Insurance Department without the express authorization of policyholders or their beneficiaries could place the German insurers in violation of the Bundesdatenschutzgesetz (German Federal Data Protection Act, "BDSG"). Federal Republic of Germany Amicus Brief at 6). Violation of the BDSG "may result in criminal as well as civil penalties." (Federal Republic of Germany Amicus Brief at 6). Gerling submits the Declaration of Dr. Spiros Simitis, a professor at Yale Law School and a former Data Protection Commissioner of the German State of Hesse. After an extensive analysis of the BDSG, Simitis states that "under present conditions, [Gerling's] German affiliates are not allowed to transfer the data requested." (Gerling: Reif Decl. Ex. 10, Simitis Decl. ¶ 28)[12]

Defendant argues that in fact, the HVIRA and related statutes do not conflict with the BDSG. Defendant submits the declaration of Paul Schwartz, a professor at Brooklyn Law School. Schwartz states that he has been recognized as an expert on data protection law. He disagrees with Simitis' final conclusion and gives his own lengthy interpretation of the

[12] Simitis also notes that European Union has a Data Protection Directive which "explicitly affirms the individual's right to determine the use of her or his data." (Gerling Reif Decl. Ex. 10, Simitis Decl.¶ 11).

BDSG. (Opp'n.: Schwartz Decl. ¶ 6).[13]

There is an obvious dispute as to whether the HVIRA conflicts with the German BDSG and other European laws. The very fact that a state law requires a foreign company to do something that arguably violates the laws of the countries in which it is incorporated or does business shows that the law has an effect on international relations which is more than "incidental."

Plaintiffs have made a persuasive showing that the HVIRA interferes with foreign relations, has great potential for disruption or embarrassment, and has more than an incidental effect in foreign countries. Accordingly, plaintiffs have shown a probability of success on their claim that the HVIRA interferes with the federal government's control over foreign affairs.[14]

[13] Defendant also argues that the ICHEIC has already published the names of some German companies policyholders on its website. Defendant argues that it "defies logic" that the ICHEIC would violate German laws. The question is not before the court as to whether the ICHEIC's actions violated German laws.

[14] Defendant cites *Trojan Technologies* v. *Commonwealth of Pennsylvania*, 916 F.2d 903 (3rd Cir. 1990) in an attempt to distinguish *Zschernig*. In *Trojan*, the Third Circuit examined a Pennsylvania "buy American" statute. This statute required agencies of the Commonwealth when constructing public works to include a provision in all contracts that steel used in the projects must be produced in the United States. *See id.* at 904. The Third Circuit found this statute did not interfere with the federal government's exercise of the Foreign Affairs power because "[t]he Pennsylvania statute exhibits none of the dangers attendant on the statute reviewed in *Zschernig*." *Id.* at 913. The Third Circuit noted that the statute was evenhanded in its application, applying to steel from any foreign source "without respect to whether the source country might be considered friend of foe." *Id.* Here, while the HVIRA is arguably evenhanded, it does exhibit other "dangers" not at issue in *Trojan*, and thus violates the Foreign Affairs power. Among other things, the HVIRA is inconsistent with several of the national government's statements, policies, and promises, and it potentially violates foreign laws. Thus, it affects foreign relations, is potentially disruptive and

B. *Commerce Clause*

The Commerce Clause reserves to Congress the right "to regulate commerce with foreign Nations, and among the several States . . . ." U.S. Const. art. 1, § 8, cl. 3. "[E]ven in the absence of specific action taken by the Federal Government," the Commerce Clause limits the powers of states to enact laws regulating interstate or foreign commerce. *Wardair Canada, Inc.* v. *Florida Dep't. of Revenue*, 477 U.S. 1, 7-8, 106 S. Ct. 2369, 91 L. Ed. 2d 1 (1986).

1. *McCarran-Ferguson Act*

State regulation and taxation of insurance is often excepted from Commerce Clause restrictions through the McCarran-Ferguson Act. This Act was passed in the wake of *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533, 88 L. Ed. 1440, 64 S. Ct. 1162 (1944), which held that insurance is "commerce" within the meaning of the Commerce Clause. *See Western and Southern Life* v. *State Board of Equalization of Cal.*, 451 U.S. 648, 653-654, 68 L. Ed. 2d 514, 101 S. Ct. 2070 (1981). Congress, believing "that the business of insurance is a local matter, to be subject to and regulated by the laws of the several States," enacted the McCarran-Ferguson Act, which Congress intended to restore state taxing and regulatory powers over the insurance business to their pre *South-Eastern Underwriters* scope. *See id.* at 654 (quoting H.R. Rep. No. 143, 79th Cong., 1st Sess., 2). Specifically, the Act states, "the business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a).

Defendant thus argues that the HVIRA is exempted from Commerce Clause restrictions by the McCarran-Ferguson Act. The HVIRA, however, does not appear to fall within the scope

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embarrassing, and has more than incidental effects in foreign countries.

of regulations intended to be exempted by the Act.

In *Federal Trade Commission* v. *Travelers Health Association*, 362 U.S. 293, 4 L. Ed. 2d 724, 80 S. Ct. 717 (1960), the Supreme Court held that the Federal Trade Commission could issue a cease and desist order against certain insurance practices by a Nebraska insurance company. The company's activities, selling insurance through an interstate mail order insurance business, were extraterritorial, and thus were not regulated by state law within the meaning of the McCarran-Ferguson Act. *See id.* at 298. Thus, the insurance practices were not immune from federal control. The court stated that it is clear from the debate surrounding the implementation of the McCarran-Ferguson Act "that Congress viewed state regulation of insurance solely in terms of regulation by the law of the State where occurred the activity sought to be regulated. There was no indication of any thought that a State could regulate activities carried on beyond its own borders." *Id.* at 300.

The Ninth Circuit discussed the holding in *Travelers* in its opinion in *In re Insurance Antitrust Litigation* v. *Ace Check Cashing Inc.*, 938 F.2d 919 (1991), *aff'd in part, rev'd in part* by *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 125 L. Ed. 2d 612, 113 S. Ct. 2891 (1993). "[E]stablished law blocks regulation by one state of the United States of the insurance business outside the borders of that state." 938 F.2d at 928. "[A] state does not have power to regulate in any way contracts of insurance or reinsurance entered into outside its jurisdiction even though the risks covered were risks within the state." *Id.*

Here, the HVIRA attempts to regulate the decision making authority of European insurance companies to pay or not to pay claims on European policies. *See* Cal. Ins. Code. § 13801(f) ("This chapter is necessary to . . . encourage the development of a resolution to these [Holocaust era insurance claim] issues through the international process or through direct action by the State of California."). The HVIRA specifically asks for

information about insurance policies sold "directly or through a related company, to persons in Europe, which were in effect between 1920 and 1945." Cal. Ins. Code § 13804(a). Clearly the "State where occurred the activity sought to be regulated" was not California. *Travelers*, 362 U.S. at 300.

Further, in discussing the passage of the McCarran-Ferguson Act, the Supreme Court stated, "one of the major arguments advanced by proponents of leaving regulation to the States was that the States were in close proximity to the people affected by the insurance business and, therefore, were in a better position to regulate that business than the Federal Government." *Id.* at 302. Although some of the people affected by the HVIRA may now be California residents, the HVIRA makes no distinction between reporting insurance policies related to California residents and insurance policies related to residents of any other state or foreign county. There is no legitimate reason why California should regulate the reporting of these policies.

Under *SEC* v. *National Secur. Inc.*, 393 U.S. 453, 460, 21 L. Ed. 2d 668, 89 S. Ct. 564 (1969), licensing companies is considered the "business of insurance" within the meaning of the McCarran-Ferguson Act. However, the gist of the HVIRA is not about licensing insurance companies, but rather about forcing companies to report on insurance policies issued in Europe and using the threat of license suspension as an enforcement mechanism.

The McCarran-Ferguson Act does not insulate the HVIRA from analysis under the Commerce Clause.

2. *Violations of the Commerce Clause*

Plaintiffs have shown a probability that the HVIRA violates the Commerce Clause. Although there is only one Commerce Clause, "state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny" than are regulations on interstate commerce. *South-*

Central Timber Dev., Inc. v. *Wunnicke*, 467 U.S. 82, 100, 81 L. Ed. 2d 71, 104 S. Ct. 2237 (1984). The section of the commerce clause dealing with foreign commerce is often referred to as "the Foreign Commerce Clause."

a. *One Voice*

The Foreign Commerce Clause is a subset of the broader foreign affairs powers discussed above. "Foreign commerce is pre-eminently a matter of national concern." *Japan Line, LTD.* v. *County of Los Angeles*, 441 U.S. 434, 448, 60 L. Ed. 2d 336, 99 S. Ct. 1813 (1979). "In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Id.* "The Federal Government must speak with one voice when regulating commercial relations with foreign governments." *Id.*

The HVIRA potentially prevents the federal government from speaking with one voice in its expectations of foreign insurance companies. Under the HVIRA, foreign insurance companies must conduct an extensive and thorough search for records. *See* Cal. Ins. Code §§ 13804(a) and 13804(b). Further, the companies must certify whether or not claims of Holocaust victims have been paid, and must certify whether or not they have searched for the victims. *See* Cal. Ins. Code § 13804(b). These demands emanate not from the national government, but from an individual state, and would be in conflict with the national government's promises to Germany that the German Foundation would be the exclusive relief for claims from Holocaust victims.[15]

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[15] Defendant points out that commerce is controlled by Congress, not the Executive Branch. *See Barclays Bank* v. *Franchise Tax Bd.*, 512 U.S. 298, 329, 129 L. Ed. 2d 244, 114 S. Ct. 2268 (1994). However, Congress "may delegate very large grants of its power over foreign commerce to the President, who also possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs." *Id.* (internal quotations omitted).

3. *Commerce Outside State Borders*

The Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy* v. *Beer Ins.*, 491 U.S. 324, 105 L. Ed. 2d 275, 109 S. Ct. 2491 (1989). Defendant argues that the commerce does not take place wholly outside of California's borders. "The critical question is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id.* (citing *Brown Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 579, 90 L. Ed. 2d 552, 106 S. Ct. 2080 (1986).

The practical effect of the HVIRA is that insurance companies that sold policies during the applicable time period must make an extensive search of their warehouses to come up with a list of individuals that might include Holocaust victims. It is common sense that most, if not all, of the companies that sold policies in Europe from 1920-1945 were European. They are being asked to gather voluminous European records of policies sold to Europeans and to report these records to California. The required records are not in any way tailored toward California citizens. The only connection to California is that the statute is enforced by taking away the company's or its affiliate's California license and the reporting is done to California. Clearly, California is meddling in foreign commerce entirely outside its borders.

Plaintiffs have shown a probability of success on the merits that the HVIRA violates the Commerce Clause.

C. *Other Constitutional Claims*

Because the court finds that plaintiffs have demonstrated a probability of success on the merits that the HVIRA is unconstitutional based on a violation of the federal foreign affairs power and a violation of the Commerce Clause, the court does not address the remaining constitutional issues.

IV. *Irreparable Injury*

It is the plaintiff's burden to demonstrate that the balance of irreparable harm favors the plaintiff. *See Carribean Marine Servs. Co.* v. *Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988). "Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction . . . a plaintiff must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief." Plaintiffs have met this burden.

The required reports under California Insurance Code section 13804 were due April 7, 2000. *See* Cal. Code Regs. § 2278. Under section 13806, if the parties did not file the reports by May 7, 2000, the Commissioner "shall suspend the certificate of authority to conduct insurance business in the state." Cal. Ins. Code § 13806.

Plaintiffs have demonstrated that suspension of their licenses to practice insurance in the state of California would cause them irreparable harm. Such suspension could undermine the goodwill of the company because the market may infer that the company is unstable. Further, a suspension would prevent plaintiffs from being able to renew contracts for their existing policy holders causing further loss of goodwill. *See Rent-a-Center, Inc.* v. *Canyon Television and Appliance*, 944 F.2d 597, 603 (9th Cir. 1991) (affirming preliminary injunction and holding that damage to the goodwill of a business supports a finding of irreparable injury).

In addition, suspension is likely to cause reputational injury resulting in a loss of market share. *See United Services Automobile Ass'n* v. *Muir*, 792 F.2d 356, 362 (3rd Cir. 1986) Suspension might suggest marketplace fraudulent or illegal activity or financial instability. *See id.* Plaintiffs point out that suspending their licenses will imply publicly that the companies are implicated with the wrongdoings of the Holocaust, has acted illegally, or is not financially sound. Indeed, the Commissioner has already made such implications.

For example, the California Department of Insurance has a website. One page is dedicated to Winterthur. Next to Winterthur is a picture of a concentration camp. The caption reads, "This company is an affiliate of one of what could be many companies that have outstanding, unpaid claims owed to Holocaust survivors, their heirs and beneficiaries, for life and property loss resulting from the atrocities committed during the Holocaust. It is time for justice." (Winterthur: Smith Decl. Ex 1; *http://www.insurance.ca.gov/docs/FS-Holocaust.htm.* Suspending Winterthur's license would further implicate the company, causing irreparable harm. *See Ross-Simons, Inc.* v. *Baccarat, Inc.*, 102 F.3d 12, 20 (1st Cir. 1996) ("By its very nature injury to goodwill and reputation is not easily measured or fully compensable in damages. Accordingly, this kind of harm is often held to be irreparable.")

The public interest is also an important factor to be considered in a suit for injunctive relief affecting the public interest. *See Miller* v. *California Pac. Med. Ctr.*, 991 F.2d 536, 540 (9th Cir. 1993). If plaintiffs' licenses are suspended, the companies would not be able to write any new business in California. Although they would be obligated to service claims on existing policies until those policies expired by their natural terms, the companies would not be able to modify or renew the existing policies. For example, if a policyholder wanted to increase her policy limits, she would not be able to do so.

In many cases, the existing policy will expire within the year. At the end of the year, policyholders will be scrambling to find new insurers. This task could become more difficult due to the decreased number of insurance companies in the state as a result of the suspension provisions of the HVIRA.

Finally, license suspension would undoubtably affect the insurance companies' employees. Companies that could no longer write policies in California would likely have to lay off or fire their employees engaged in underwriting and sales. Plaintiffs have demonstrated that irreparable harm will likely

occur if the HVIRA is enforced.

V. *Conclusion*

None of the plaintiffs deny that the Holocaust was a terrible atrocity. And none of the plaintiffs deny that the victims and their heirs and beneficiaries should be compensated to the extent possible. However, even though the end goal of such compensation is laudable, this goal may not be achieved through unconstitutional means. Plaintiffs have shown a probability of success on the merits of their claim and have shown that irreparable harm will occur if the court does not enjoin enforcement of the HVIRA.

IT IS THEREFORE ORDERED that plaintiffs motions for preliminary injunction be, and the same hereby are, GRANTED.

Pending final judgment in these actions, defendant is enjoined from enforcing the provisions of the Holocaust Victim Insurance Relief Act and the accompanying regulations. Cal. Ins. Code §§ 13800-13807 and Cal. Code Regs. §§ 2278-2278.5.

DATED: June 9, 2000

William B. Shubb /s/
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause, U.S. CONST. amend. XIV, § 1, provides in relevant part that no State shall "deprive any person of life, liberty, or property, without due process of law."

The Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, provides in relevant part that "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The provision of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, relevant to this case states:

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

The California Holocaust Victim Insurance Relief Act of 1999, Cal. Ins. Code §§ 13800-13807, was enacted as part of the following legislation:

Assembly Bill No. 600

CHAPTER 827

An act to amend Section 354.5 of the Code of Civil Procedure, and to add Chapter 4 (commencing with Section 13800) to Division 3 of the Insurance Code, relating to insurance claims of Holocaust victims, making an appropriation therefor, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor October 8, 1999. Filed

with Secretary of State October 10, 1999.]

LEGISLATIVE COUNSEL'S DIGEST

AB 600, Knox. Insurance claims of Holocaust victims.

(1) Existing law prescribes certain powers and duties of the Insurance Commissioner and of the Department of Insurance. Existing law requires the department to develop and implement a coordinated approach to gather, review, and analyze the archives of insurers and other archives and records, as specified, to provide for research and investigation into insurance policies, unpaid insurance claims, and related matters of victims of the Holocaust or the Nazi-controlled German government or its allies, and the beneficiaries and heirs of those victims, and for losses arising from the activities of the Nazi-controlled German government or its allies for insurance policies issued before and during World War II by insurers who have affiliates or subsidiaries authorized to do business in the state.

Existing law also provides that the department has an affirmative duty to play an independent role in representing the interests of Holocaust survivors, and provides that if an insurer

or any affiliate of an insurer has failed to pay any valid claim from Holocaust survivors, the certificate of authority of the insurer shall be suspended until the insurer, or its affiliates, pays the claim or claims.

This bill would, in addition, enact the Holocaust Victim Insurance Relief Act of 1999, which would, among other things, require the commissioner to establish and maintain the Holocaust Era Insurance Registry, which would contain records and information relating to insurance policies issued by insurers in the state, either directly or through a related company, to persons in Europe which were in effect between 1920 and 1945. This bill would require those insurers to file or cause to be filed that information with the commissioner to be entered into the registry. It would also require those insurers to certify as true certain additional information, and would make it a crime to knowingly certify as true any material matter which the insurer knows to be false. By creating a new crime, this bill would impose a state-mandated local program. This bill would also provide for certain civil penalties for knowingly filing false information about a policy, as required by these new provisions. The bill would appropriate these civil penalties from the General Fund to the Department of Insurance to be used to aid in the resolution of Holocaust insurance claims. It would also require the commissioner to suspend the certificate of authority of any insurer that fails to comply with these requirements by the 210th day of the effective date of these provisions, and to adopt emergency rules to implement these provisions.

(2) Existing law authorizes any Holocaust victim, as defined, or heir or beneficiary of a Holocaust victim, who resides in this state and has a claim arising out of an insurance policy or policies purchased in Europe between 1920 and 1945 from a specified insurer to bring a legal action to recover on that claim in any superior court of the state for the county in which the plaintiff or one of the plaintiffs resides, which shall be vested with jurisdiction over that action until its completion

or resolution. Existing law also provides that any claim of this type shall not be dismissed for failure to comply with the applicable statute of limitation if the action is commenced on or before December 31, 2010.

This bill would instead authorize those persons to bring a legal action to recover on a claim arising out of an insurance policy or policies purchased or in effect in Europe before 1945 from a specified insurer, and would change the definition of "Holocaust victim" and "insurer," as specified.

(3) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

(4) This bill would declare that it is to take effect immediately as an urgency statute.

Appropriation: yes.

The people of the State of California do enact as follows:

SECTION 1. Section 354.5 of the Code of Civil Procedure is amended to read:

354.5. (a) The following definitions govern the construction of this section:

(1) "Holocaust victim" means any person who was persecuted during the period of 1929 to 1945, inclusive, by Nazi Germany, its allies, or sympathizers.

(2) "Related company" means any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer.

(3) "Insurer" means an insurance provider doing business in the state, or whose contacts in the state satisfy the

constitutional requirements for jurisdiction, that sold life, property, liability, health, annuities, dowry, educational, casualty, or any other insurance covering persons or property to persons in Europe at any time before 1945, directly or through a related company, whether the sale of the insurance occurred before or after the insurer and the related company became related.

(b) Notwithstanding any other provision of law, any Holocaust victim, or heir or beneficiary of a Holocaust victim, who resides in this state and has a claim arising out of an insurance policy or policies purchased or in effect in Europe before 1945 from an insurer described in paragraph (3) of subdivision (a), may bring a legal action to recover on that claim in any superior court of the state for the county in which the plaintiff or one of the plaintiffs resides, which court shall be vested with jurisdiction over that action until its completion or resolution.

(c) Any action brought by a Holocaust victim or the heir or beneficiary of a Holocaust victim, whether a resident or nonresident of this state, seeking proceeds of the insurance policies issued or in effect before 1945 shall not be dismissed for failure to comply with the applicable statute of limitation, provided the action is commenced on or before December 31, 2010.

SEC. 2. Chapter 4 (commencing with Section 13800) is added to Division 3 of the Insurance Code, to read:

CHAPTER 4. HOLOCAUST ERA INSURANCE REGISTRY

13800. This chapter shall be known and may be cited as the Holocaust Victim Insurance Relief Act of 1999.

13801. The Legislature finds and declares the following:

(a) During World War II, untold millions of lives and property were destroyed.

(b) In addition to the many atrocities that befell the

victims of the Nazi regime, insurance claims that rightfully should have been paid out to the victims and their families, in many cases, were not.

(c) In many instances, insurance company records are the only proof of insurance policies held. In some cases, recollection of those policies' very existence may have perished along with the Holocaust victims.

(d) At least 5,600 documented Holocaust survivors are living in California today. Many of these survivors and their descendents have been fighting for over 50 years to persuade insurance companies to settle unpaid or wrongfully paid claims. Survivors are asking that insurance companies come forth with any information they possess that could show proof of insurance policies held by Holocaust victims and survivors, in order to ensure that closure on this issue is swiftly brought to pass.

(e) Insurance companies doing business in the State of California have a responsibility to ensure that any involvement they or their related companies may have had with insurance policies of Holocaust victims are disclosed to the state and to ensure the rapid resolution of these questions, eliminating the further victimization of these policyholders and their families.

(f) The international Jewish community is in active negotiations with responsible insurance companies through the International Commission on Holocaust Era Insurance Claims to resolve all outstanding insurance claims issues. This chapter is necessary to protect the claims and interests of California residents, as well as to encourage the development of a resolution to these issues through the international process or through direct action by the State of California, as necessary.

13802. For purposes of this chapter, the following definitions shall apply:

(a) "Holocaust victim" means any person who was persecuted during the period of 1929 to 1945, inclusive, by

Nazi Germany, its allies, or sympathizers.

(b) "Related company" means any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer.

(c) "Proceeds" means the face value or other payout value of insurance policies and annuities plus reasonable interest to date of payment without diminution for wartime or immediate postwar currency devaluation.

13803. The commissioner shall establish and maintain within the department a central registry containing records and information relating to insurance policies, as described in Section 13804, of Holocaust victims, living and deceased. The registry shall be known as the Holocaust Era Insurance Registry. The Attorney General, in coordination with the department, shall establish appropriate mechanisms to ensure public access to the registry.

13804. (a) Any insurer currently doing business in the state that sold life, property, liability, health, annuities, dowry, educational, or casualty insurance policies, directly or through a related company, to persons in Europe, which were in effect between 1920 and 1945, whether the sale occurred before or after the insurer and the related company became related, shall, within 180 days following enactment of this act, file or cause to be filed the following information with the commissioner to be entered into the registry:

(1) The number of those insurance policies.

(2) The holder, beneficiary, and current status of those policies.

(3) The city of origin, domicile, or address for each policyholder listed in the policies.

(b) In addition, each insurer subject to subdivision (a) shall certify to any of the following:

(1) That the proceeds of the policies described in subdivision (a) have been paid to the designated beneficiaries or their heirs where that person or persons, after diligent search, could be located and identified.

(2) That the proceeds of the policies where the beneficiaries or heirs could not, after diligent search, be located or identified, have been distributed to Holocaust survivors or to qualified charitable nonprofit organizations for the purpose of assisting Holocaust survivors.

(3) That a court of law has certified in a legal proceeding resolving the rights of unpaid policyholders, their heirs, and beneficiaries, a plan for the distribution of the proceeds.

(4) That the proceeds have not been distributed and the amount of those proceeds.

An insurer who certifies as true any material matter pursuant to this subdivision, which the insurer knows to be false, is guilty of a misdemeanor.

(c) An insurer currently doing business in the state that did not sell any insurance policies in Europe prior to 1945, shall not be subject to this section if a related company, whether or not authorized and currently doing business in the state, has made a filing under this section.

13805. Any insurer that knowingly files information about a policy required by this chapter that is false shall, with respect to that policy, be liable for a civil penalty not to exceed five thousand dollars ($5,000), which penalty is hereby appropriated to the department to be used by it to aid in the resolution of Holocaust insurance claims.

13806. The commissioner shall suspend the certificate of authority to conduct insurance business in the state of any insurer that fails to comply with the requirements of this chapter by the 210th day after this section becomes effective, until the time that the insurer complies with this chapter.

13807. The commissioner shall adopt rules to implement this chapter within 90 days of its effective date. The rules shall be adopted as emergency regulations in accordance with Chapter 3.5 (commencing with Section 11340) of the Government Code, and for the purposes of that chapter, including Section 11349.6 of the Government Code, the adoption of the rules shall be considered by the Office of Administrative Law to be necessary for the immediate preservation of the public peace, health and safety, and general welfare.

SEC. 3. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

SEC. 4. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to establish the Holocaust Era Insurance Registry and to ensure the resolution of claims under insurance policies held by Holocaust victims and survivors at the earliest possible time, it is necessary that this act take effect immediately.

APPENDIX F

THE DEPUTY SECRETARY OF THE TREASURY

Washington

November 30, 1999

The Honorable Gray Davis
Governor
State Capitol Building
Sacramento, CA 95814

Dear Governor Davis:

I am confident that the motivation behind the California Holocaust Victim Insurance Relief Act of 1999 is a genuine commitment to justice for Holocaust victims and their families. However, honorable intentions do not necessarily translate into effective results. The subpoenas by California Insurance Commissioner Quackenbush served on several subsidiaries of European insurance companies engaged in the International Commission on Holocaust Era Insurance Claims, that includes the California Commissioner, could undermine the Commission as it prepared to launch a claims process. The Commission, built through long and arduous negotiations, holds tangible and immediate promise to providing that California's legislation attempts to seek, relief for Holocaust victims.

Permit me to explain. For four years, I have been directing the Administration's broad-based effort to bring some measure of justice to Holocaust victims and their families, especially those victims for whom no previous relief was provided and to those whose claims fell between the cracks of existing programs. While my efforts have ranged from stolen art, to communal property, to clocked bank accounts, my focus over the last eight months has been on obtaining dignified monetary recognition of the suffering of hundreds of thousands of former slave and forced laborers during the Nazi era. Many of these people are now American citizens.

I have been facilitating negotiations among class action lawyers representing some of the victims, the governments of Central and Eastern European countries and the State of Israel, Jewish organizations, representatives of German industry (including insurance companies), and the German government. Despite the incredible complexity of these negotiations, we have made progress toward a settlement, although subsequent hurdles must be overcome. All of the elements are ready to fall into place: the definition of the several classes of beneficiaries, agreement on the numbers of beneficiaries, the payment mechanisms, and the essential "legal peace" that will be offered to German industry once a settlement is agreed. The key remaining issue is the final size of the financial package, and we have dramatically narrowed the gap between the two sides to what I believe is a bridgeable difference.

Clearly, for this deal to work — and I emphasize that we are talking about providing a dignified payment to elderly beneficiaries whose numbers approach perhaps over 1.5 million persons — German industry and the German government need to be assured that they will get "legal peace", not just from class-action lawsuits, but from the kind of legislation represented by the California Victim Insurance Relief Act.

I know that some could argue that California will need to make a judgment on whether its requirements have been met once a final agreement with the Germans has been reached. I will be very comfortable defending what I hope those negotiations will accomplish. However, you should know that actions by California, pursuant to this law, have already potentially damaged and could detail both a settlement of the forced and slave labor negotiations and the progress already achieved by the International Commission on Holocaust Era Insurance Claims, chaired by former Secretary of State Lawrence Eagleburger.

I have written to Commissioner Quackenbush about the subpoenas issued under the California Victim Insurance Relief

Act aimed at determining whether the companies intend to comply with the law at some future date and am pleased to share this letter with you. Chairman Eagleburger has expressed his opposition to sanctions and other pressures brought by California on companies from whom he is obtaining real cooperation and from whom Holocaust survivors — some of them citizens of California — stand to benefit. I strongly support the International Commission's efforts to create a claims adjudication process and must emphasize that those companies cooperating with the Commission deserve safe haven from sanctions and subpoenas under California legislation.

With regard to slave and forced labor negotiations, we German companies have already pledged to raise DM 5 billion to pay all those who were forced to work for all German companies, not just their own workers, regardless of whether those companies still exist or are able to contribute to the fund. The German government has pledged DM 3 billion. But when these same companies tell us they or their subsidiaries are subpoenaed pursuant to California's Holocaust law, they wonder why they are cooperating.

Governor Davis, we are close to agreement on both the slave and forced labor claims and insurance claims process. I ask for your help, to continue the "safe harbor" from subpoenas and sanctions for participating insurance companies while we seek to finalize both of these negotiations in these next few critical weeks.

Very truly yours,

/s/

Stuart E. Eizenstat

Attachment: as stated

APPENDIX G

TREASURY NEWS

OFFICE OF PUBLIC AFFAIRS • 1500 PENNSYLVANIA AVENUE, N.W. • WASHINGTON, D.C. • 20220 • (202) 622-2960

EMBARGOED UNTIL 2 P.M. EDT
Text as Prepared for Delivery
April 5, 2000

Deputy Treasury Secretary Stuart E. Eizenstat
Special Representative of the Secretary of State and
the President on Holocaust-Related Issues
Senate Foreign Relations Committee

Mr. Chairman, Senator Biden, I appreciate the opportunity to testify today. The effort of the U.S. Congress to provide a public forum for the discussion of Holocaust-related matters over the past several years has been a powerful asset in our work to bring justice, however belated, to Holocaust survivors and other victims of World War II and to bring out long-suppressed truths about World War II and Holocaust-era assets.

You have just heard one of the true witnesses of the Holocaust, Elie Weisel. No one can exceed his eloquence and his towering moral stature on this subject.

The Holocaust was not only the worst genocide in history, but also perhaps history's greatest theft. In order to operate their war machine, the Nazis stole the gold from the treasuries of the nations they occupied; took the valuables of the people they killed, including gold from their victims' teeth; looted the museums and private art collections of Europe of over an estimated 600,000 works of art; and forced some twelve million people to work in their factories and fields, under terrible conditions and for little or no pay, to free German workers to

serve in the military. Jewish businesses were "Aryanized" — that is seized from their owners and turned over to others often with the complicity of German banks. Jews were forced to sell their homes for little or no compensation. Their personal property was stripped from them before they were sent off to the camps. Their communal property — synagogues, cultural centers, schools, and cemeteries — was confiscated and most of it destroyed.

Over the last several years, our government has been trying in cooperation with other governments and many private organizations, to bring some measure of justice to surviving victims and their families by recovering property that was stolen from them, by enforcing their rights under insurance contracts that were abrogated, by compensating them for personal injuries sustained and for slave labor and forced labor performed under brutal conditions. Over one hundred thousand Holocaust survivors, and tens of thousands of other Americans who were forced laborers during the War live in the United States. These issues have great significance to them. Our policy on Holocaust issues also serves important U.S. foreign policy interests, such as maintaining close relations with Germany, a partner of ours in promoting and defending democracy for the last fifty years and a nation that is vital to both the security and economic development of Europe and, with Switzerland, a major trading partner. It also helps in the removal of impediments to greater cooperation and unity among the nations of that continent. More broadly, the horrors of the Holocaust provided a lesson applicable to contemporary events. The firm action of the United States and NATO in Kosovo were motivated, in part, by an unwillingness to repeat the world's indifference to the plight of peoples subjected to genocidal persecution. UN judicial tribunals dealing with Rwanda and Kosovo build on the precedent of the Nuremberg trials. The bipartisan focus on human rights violations, from Chechnya to China, resonates with Holocaust-related issues.

Slave and Forced Labor and Other Wrongs

I would like to start with the current negotiations over slave and forced labor and other wrongs. The parties to these negotiations include the Conference on Jewish Material Claims against Germany, the lawyers for the victims, and the Governments of Belarus, the Czech Republic, Poland, Russia, Ukraine and the State of Israel. The United States Government, represented by myself, and the German government, represented by Count Otto Lambsdorff, co-chair the talks. They are focused on the establishment and funding of a new entity, to be created by the Federal Republic of Germany, to be called the Foundation for Remembrance, Responsibility and the Future. Through this Foundation Initiative, those who worked as forced and slave laborers and those who suffered at the hands of German companies during the Nazi era can receive recognition of their suffering and dignified payments.

These negotiations, which have been ongoing for the last year, through eleven formal negotiating rounds and innumerable other informal sessions, are proceeding in four phases: (1) agreement on the total amount of money available to the Foundation; (2) agreement on the allocation of that sum among different categories of claims and, in the case of forced and slave labor claims, by country; (3) legislation that must be passed by the Bundestag creating the Foundation and confirming the agreements made during the negotiation; and (4) an undertaking by the United States, to be confirmed in an Executive Agreement between our government and the German government, that it will support "legal peace" for German companies in the following manner: in any actions brought against German industry arising out of the Nazi era, our government will file in court a Statement of Interest requesting that, assuming the establishment of a comprehensive Foundation, the Foundation be the exclusive remedy for Nazi-era claims against German companies and that dismissal of such cases is in the U.S. foreign policy interest.

Last December, after hard negotiation, the first phase was completed. The German companies and government agreed to raise their combined contribution to the Foundation's capitalization to 10 billion DM, half from German companies and half from the German government. This amounts to approximately $5 billion under current exchange rates. That sum will cover all World War II injuries committed by German companies, including slave and forced labor to insurance, banking, Aryanized property and medical experiments. This offer was a substantial increase over the initial German proposal of 1.5 billion DM at the beginning of the process, 6 billion DM in October and a subsequent offer of 8 billion DM in November. All the parties to these negotiations accepted the 10 billion DM offer as the capped amount for the German Foundation and the sum that will resolve the lawsuits.

Two weeks ago, in Berlin, after another long and arduous negotiation, we successfully completed the second phase, an agreement on allocation, I would like to spell it out in some detail.

Of the 10 billion DM, 8.1 billion plus 50 million in anticipated interest earnings will be allocated to pay claims to slave and forced laborers and to others for personal injuries. One billion will go to property claims and insurance claims, as well as property and insurance humanitarian funds. 700 million DM will go into a Future Fund the purpose of which will be to promote tolerance and advance social programs, taking into account the heirs of forced laborers. 200 million DM will be used for administration of the Foundation.

The labor payments will be allocated among the Conference on Jewish Material Claims and five Reconciliation Foundations — in Poland, Ukraine, Russia, Belarus and the Czech Republic — created around the time of German reunification and funded by the German government to make payments to Nazi victims. An additional allocation will be made to an organization or organizations, yet to be designated,

that will cover survivors living in the rest of the world, including the United States.

The Reconciliation Foundations in the five Central European countries will handle payments to all their citizens, including Jewish slave laborers. The Claims Conference will reach surviving slave laborers residing outside these five countries.

The agreed allocations, including an amount of estimated earned interest, are as follows:

Claims Conference	1.812 billion DM
Poland	1.812 billion DM
Ukraine	1.724 billion DM
Russia	835 million DM
Belarus	694 million DM
Czech Republic	423 million DM
Rest of the World	800 million DM
Other Personal Injury (e.g. medical experiments)	50 million DM

The one billion DM for property issues will be divided as follows: 350 million for claims for which there is clear documentation and 650 million for humanitarian cases, in which the certitude of the documentation has been eroded by the passage of time. The humanitarian portion will be further divided between insurance and property. All property and humanitarian claims would go to those who must first certify their property was looted. The 350 DM for claims for which there is clear documentation will be divided even further: 150 million for claims where the taking of property was racially motivated, 50 million for all other property claims and 150 million for insurance claims, which will be supplemented by an additional 50 million DM generated from earned interest from the Foundation capital. There will be an additional reserve of 100 million DM in the Future Fund to cover additional insurance claims, creating the potential for 300 million DM in insurance claims, if required.

In phase three, the German cabinet has submitted to the Bundestag draft legislation creating the Foundation. The German Foundation will be established under German law. We welcome this because the Foundation is the vehicle through which the German Government will appropriate their five billion DM contribution, and because it will subject the Foundation to well established oversight and accountability requirements that charitable organizations in Germany must meet.

On February 16, I had the privilege of testifying before the Bundestag Committee on Domestic Affairs concerning the issues we believe still need to be resolved in the draft legislation creating the Foundation. I was particularly grateful for the opportunity to testify before the Bundestag, recognizing just how unusual it is to have a foreign government official testify concerning domestic legislation. Such an invitation underscores the unique and historic nature of this initiative.

I said in my testimony that the German legislation must embody the elements that are necessary for us to accomplish our goal: the creation of a comprehensive, fair, and transparent Foundation that will make payments to some one million victims of the Nazi era in return for assisting the German companies with achieving legal peace in U.S. courts. In the testimony and in subsequent meetings, I have reiterated that the legislation needs to reflect the compromises and agreements that were reached during the many months of negotiations on the substantive issues. I have reminded the Germans that if it fails to do so, it is unlikely that the plaintiffs' lawyers will in fact agree to dismiss their cases or that the U.S. Government can assist in providing the breadth of legal peace the German companies desire and deserve.

I believe the German Government fully recognizes the importance of passing legislation that the participants and the United States Government can support as faithful to our negotiations, and that it recognizes the importance of creating

a structure and a process that, once enacted, can allow the legal peace German companies seek.

The most significant remaining issue regarding the legislation concerns the scope of the Foundation. The Foundation must be empowered to offer a potential remedy for any conceivable claim against German industry arising out the Nazi era. Without such universality, we will not be able to go before a U.S. court to state that the Foundation offers a remedy, that should be regarded by the court as the exclusive remedy for all Nazi era suits against German companies.

During technical level talks with the German Government and companies this week, we had a productive discussion of this and all of the remaining issues. I am gratified that the Germans reaffirmed their intention to work with us to resolve these outstanding issues on an expedited basis. We understand passage of the legislation is expected by July, which would allow the Foundation to be up and running and to begin making payments by the end of the year.

It is critical for Congress and the American people to understand why the U.S. Government would provide Statements of Interest urging U.S. courts to view the German Foundation Initiative as the exclusive remedy for claims for Nazi-era claims against German companies and to indicate that dismissal of current and future suits is in the foreign policy interests of the U.S. Conventional litigation would be a highly unsatisfactory solution for elderly slave and forced laborers and others injured by German companies during the War. The reasons why the German Foundation Initiative is a superior remedy are as follows:

First, the success of litigation is problematic, given the variety of legal defenses available. Already, federal judges have dismissed two of the cases.

Second, litigation would take years to reach fruition, with lengthy discovery, motions and appeals. Survivors average

around 80 years of age and are passing away at a rate of some one percent a month. Thus, few survivors would benefit from litigation, even if it were successful. Even a classic class action settlement would take years to consummate, as the Swiss bank settlement underscores.

Third, any litigation would benefit only, at best, a small subset of surviving slave and forced workers, compared to the number who would benefit from the German Foundation Initiative. This is because the only survivors who could recover in such litigation are the few thousands who were employed — and could prove it under strict judicial rules — by the few German companies, less than 20, who were sued because they do business in the U.S. and are subject to the jurisdiction of our courts. By contrast, the Foundation Initiative will cover, under relaxed standards of proof, some one million workers, including those who worked for German companies now defunct or not subject to U.S. jurisdiction including SS companies and companies owned by the German government. Indeed, the German legislation will permit the Reconciliation Foundations in Central and Eastern European countries to even pay forced agricultural workers, if they wish to do so. For these groups of people, the Foundation Initiative represents the only possible avenue for obtaining a measure of long-awaited justice.

There has been a good deal of expectation and confusion over who will benefit from the successful conclusion of these negotiations. Let me emphasize a few points:

- American citizens who qualify will receive the same benefits as anybody else, and their applications will be proceeded by an organization or organizations in the U.S. Travel to Germany or elsewhere will not be required.
- If Congress approves, American citizens will be able to exclude their benefits from income under a tax provision in President Clinton's 2001 Budget that provides a clear statutory exemption for Holocaust-related reparations.

- No racial, ethnic or religious group will get favorable treatment. A slave or forced laborer, whether he or she is a Czech, Pole, Jew, Romanian or another nationality or religion will qualify if they meet the required definitions.
- Detailed explanations of exactly who is eligible and how to apply for a benefit will be widely publicized. These important details are still under negotiations. But, please be assured the outreach effort — once a settlement is concluded — will be comprehensive.

I am hopeful all victims, whether or not they will directly benefit, indeed all people of good will, will take real satisfaction in the knowledge that at least deserving Holocaust survivors and other victims of Nazism will get recognition for their suffering and at least some small measure of justice.

Insurance

With the encouragement and public support of the U.S. government, the International Commission on Holocaust Era Insurance Claims (ICHEIC) was established in October 1998 by the National Association of Insurance Commissioners in cooperation with several European insurance companies, European regulators, representatives of several Jewish organizations, and the State of Israel. Chaired by former Secretary of State Lawrence S. Eagleburger, the Commission is charged with establishing a just process that will expeditiously address the issue of unpaid insurance policies issued to victims of the Holocaust. The International Commission launched its full-scale claims and outreach program in February of this year. Using relaxed standards of proof in dealing with outstanding claims from the Holocaust era, the ICHEIC process will ensure the opening of companies' files, the cross-checking of names with Yad Vashem's records of Holocaust victims, and further research into European archives to find names of potential claimants.

Secretary Eagleburger and the International Commission

have supported our efforts in the negotiations to establish the German Foundation. Because the intended beneficiaries of the ICHEIC and the German Foundation are identical with regard to insurance, and because no insurance company should have to pay twice, the International Commission became part of this broader effort when Secretary Eagleburger agreed to work to link the ICHEIC with the Foundation. Secretary Eagleburger's support not only cleared a path for agreement on the insurance portion of the German Foundation allocation, but also helped set the stage for agreement on other allocation issues.

The insurance portion of the German Foundation settlement involves funds destined for the ICHEIC, both for claims and humanitarian purposes, the details of which are as follows:

- 200 million DM were allocated for all insurance claims: 150 million DM for those arising from the German market and from German companies' policies issued outside the German market. This amount also includes the German contribution to ICHEIC administrative expenses. In addition to this amount, a supplemental amount of 50 million DM (to be drawn from interest earned by the Foundation capital) was allocated to cover claims from the non-German markets of German insurance companies.
- 100 million DM will be held in reserve in the German Foundation Future Fund only to be drawn for insurance claims, should they exceed the allocated 200 million DM.
- 350 million DM were allocated for humanitarian purposes.

The German Foundation allocation decisions have not altered the internal workings of the ICHEIC. The legislation that will establish the Foundation recognizes that ICHEIC procedures will govern the processing of all claims against German insurance companies brought to the Foundation. ICHEIC should be, in our view, the exclusive remedy for these claims. The draft legislation before the Bundestag provides that the funds allocated to the Foundation for all insurance claims

payments will be passed through to the ICHEIC; that these funds will include payments for humanitarian insurance purposes and that this money will be for the sole benefit of and administered by ICHEIC.

The issue remaining is whether all German insurance companies will join the International Commission. Count Lambsdorff has on several occasions expressed his confidence that, with the International Commission's approval of this insurance allocation, all German insurance companies that issued policies during the Holocaust era will join both the Foundation and the ICHEIC and follow ICHEIC's claims procedures. He has promised his best efforts to accomplish this goal.

We commend the five European insurance companies that have joined the ICHEIC -- Allianz, Axa, Generali, Winterthur, and Zurich. We strongly encourage all insurers that issued policies during the Holocaust era — especially those in Austria, and those in the Netherlands such as Aegon — to join the International Commission and participate fully in its programs. The ICHEIC is the best and most expeditious vehicle for resolving insurance claims from this period, and membership in the International Commission provides the only real way of both ensuring that valid claims are paid and resolving international moral and humanitarian responsibilities for heirless and nationalized claims or those against companies no longer in existence.

U.S. Government support for the International Commission on Holocaust Era Insurance Claims includes recognition that the MOU signed by the five ICHEIC member companies gives those companies cooperating with the Commission "safe haven" from sanctions, subpoenas, and hearings relative to the Holocaust period. I recently wrote to the state insurance commissioners in Washington State and California, emphasizing my strong support for the international efforts to create a claims settlement process under the International

Commission and stressing that, in their legitimate concern for Holocaust survivors, proposed actions in these states could undermine the work of the ICHEIC.

Austria

The entry of the far-right Freedom Party into a coalition government with one of Austria's mainstream parties, the conservative People's Party, has caused great concern both here and in Europe. President Clinton and Secretary of State Albright have made clear our concerns with past statements of the Freedom Party, which seem to have condoned intolerance and attempted to explain away the Holocaust. However, in the preamble to the coalition agreement, signed by both parties, the new Austrian government has promised to uphold democracy, tolerance and human rights and to condemn discrimination. We are watching developments in Austria closely to ensure that the government lives up to its promises. We will look at what the government does, as well as what it says. One important benchmark in this regard is how the new government will deal with unresolved Holocaust issues.

I am pleased to report progress in the area of forced and slave labor compensation. In early February, the new government appointed the former head of the Austrian central bank, Dr. Maria Schaumayer, as the head of a new office to deal with these issues. In an initial negotiating round on March 20, Dr. Schaumayer outlined to me her government's plans for handling forced and slave labor. The Austrian program would closely parallel the German Foundation Initiative and consist of the following elements:

- a joint effort between the Austrian government and industry;
- coordination with the German effort to assure that the German Foundation covers slave laborers in Austrian concentration camps;
- coverage by the Austrian fund of Hungarian Jews who

were forced into labor outside of the concentration camp system;

- compensation levels that would parallel those in the German effort; and
- coverage for agricultural labor.

She also outlined an ambitious timetable that would involve passage of legislation by July, if the question of legal peace could be resolved by then, and commencement of operation of the fund by the end of this year.

Dr. Schaumayer and I agreed that we would try to have two more meetings on forced and slave labor by the middle of May: one in Washington at the end of April; and Dr. Schaumayer and I will have another round of talks in May in Vienna.

While we are pleased with these commitments, the government also needs to address restitution and compensation issues. There had been a restitution effort in the 1950s and 1960s, but it had some gaps, and there may have been problems with implementation. Dr. Schaumayer said that the Austrian government may take up restitution once forced and slave labor compensation efforts are well underway. Our government will continue to convey to Austrian officials our hope that there can be an acceleration of their efforts on restitution. We hope that Austrian officials understand our concerns, and that the government plans to deal with restitution issues soon. As I have already noted, we will be watching developments in Austria closely to ensure that the government lives up to the preamble in the coalition agreement, and one important benchmark in this regard is how the new government will deal with unresolved Holocaust issues, including restitution.

Swiss Bank Settlement

Swiss banks have agreed to pay $1.25 billion to settle lawsuits brought on behalf of victims who sent their funds to Switzerland for safekeeping and whose heirs had been refused

access to those funds for over fifty years, and other victims with a relationship to the banks. The Volcker Commission found some 26,000 people who very probably had such accounts. The court is in the process of reviewing the fairness of the settlement and is trying, with the help of Yad Vashem in Jerusalem, to find their heirs so they can recover.

There has recently been progress after a four-month delay. Judge Korman, the presiding judge of this Holocaust victims assets case, had postponed his contemplated ruling on the fairness of the settlement to await the Swiss Federal Banking Commission decision on implementation of the Volcker recommendations of December 6. On March 30, the Swiss Federal Banking Commission authorized Swiss banks to publish the 26,000 accounts that are deemed by the Volcker Committee to have a probability of being related to Holocaust victims.

In addition, the Commission authorized the banks to create a central database containing these accounts plus another 20,000 that may be related to Holocaust victims. We hope that the banks continue to support the Claims Resolution Tribunal, which is necessary to process claims relating to the new accounts. We also hope that a database will be put in place in line with the recommendations of the Volcker Committee. In early December, that Committee recommended to the Swiss authorities that the databases and other documentation that were assembled on the approximately 4.1 million accounts that existed in Swiss banks during the 1933-45 period, now dispersed in over 50 locations throughout Switzerland, be centralized in one archive. The Committee believes this is an essential part of the deposit claims resolution process that will consider not only claims to accounts the names of which have already been published, but also claims from other sources. The Board of Trustees of the Claims Resolution Tribunal, which includes members of the Swiss banking community, endorsed this recommendation. Judge Korman also said the recommendation should be implemented. However, the Swiss

Federal Banking Commission stated on March 30 that it viewed this recommendation as neither necessary nor meaningful. I will confer with Paul Volcker on how the objectives of the Committee's recommendations can be achieved and keep this Committee informed.

The stage is now set for other steps that are expected in the near future relating to the Court's access to a refugee database and a list of German companies whose assets were frozen in Switzerland during the War. Once the Court obtains this and other information, such as information relating to insurance matters, it will be in a position to rule on the fairness of the settlement. Thereafter, the Special Master of the Court will be directed to submit his plan of allocation and distribution, and the Court will then hold a final hearing on the settlement.

Nazi Gold

Two massive U.S. government studies were completed in 1997 and 1998. The first discovered that over $4 billion in gold stolen by the Nazis was smelted into gold bars and converted, mostly through the Swiss National Bank, into hard currency the Nazis used to buy what they needed from neutral countries. Six tons of gold still in the hands of the Tripartite Gold Commission was owed to central banks of various nations. We found some of this gold had, in fact, been taken from Holocaust victims, not just from central banks, and had been smelted into disguised gold bars. The second study documented the role of neutral countries in supporting the Nazi war effort.

The December 1997 London Conference on Nazi Gold established the Nazi Persecutee Relief Fund to provide assistance to needy survivors of Nazi persecution. Seventeen countries have pledged $61 million. Congress appropriated $25 million over a three-year period. We allocated the first year's tranche of $4 million to the Conference on Jewish Material Claims Against Germany to provide support to survivors living in Eastern and Central Europe. We are now in the process of allocating the second tranche of $10 million. I am suggesting

that half go for the benefit of former slave and forced laborers, $4.5 million to the Claims Conference and $500,000 to several Holocaust education and research projects.

Art Restitution

At a conference in Washington in December 1998, forty-four nations reached consensus on a set of principles designed to try to find some of the 600,000 artworks stolen by the Nazis and their collaborators and return them to their pre-War owners. Some museums are implementing those principles, along with their own guidelines, to take the initial steps in returning art stolen by the Nazis to its rightful owners. Many of our largest museums have been going through their collections, seeking to identify works that may have been looted by the Nazis.

An excellent example of thorough research has been demonstrated by the National Gallery in Washington in a three-year project. From its inception, the National Gallery has conducted extensive research into the provenance of paintings in its collection, with particular attention over the past several years to the World War II era. The Gallery was in a unique position to accomplish this research because of a number of factors. It was able to devote a knowledgeable researcher full-time to the project. It has always had all its curatorial files on painting and sculpture in its collection physically located in one place. It is in the middle of a multi-year project to publish a systematic catalogue of its entire collection, which entails intense ongoing research on provenance by Gallery curators and outside authors. Its entire collection is on a database which includes all known provenance information. The Gallery's location in Washington makes it relatively accessible to the National Archives in College Park where much of the data needed for Holocaust research is located. And the Gallery itself is the repository of important relevant records, such as the personal papers of people involved in the post-war restitution efforts and records from the Munich Central Collecting Point,

to which stolen art hidden by the Nazis was shipped when uncovered by Allied armies.

In the course of its research, the Gallery discovered that eight paintings in its collection had in fact been looted during the War Archival research, however, uncovered documentation indicating that each of these works had been returned to its rightful owner after the War. A ninth painting, Frans Snyders' *Still Life with Fruit and Game*, was discovered to have gone through the hands of Karl Haberstock, a dealer known to have been involved with looted art. Despite careful research, the ownership history of this painting has not yet been established.

The National Gallery has made its entire collection available on its website, including known provenance information for all paintings and sculpture in the collection. It has made World War II provenance information easily accessible by providing expedited search capabilities, such as the ability to search provenance history by names of former owners and dealers associated with Gallery works of art. The Gallery's curatorial files and its World War II archival resources are also available on-site for research. The Gallery welcomes any information that would augment or clarify the ownership history of objects in its collection. I am submitting for the Record an example of what is available on the National Gallery's website.

The effort is not just confined to the largest museums. The North Carolina Museum of Art announced recently that one of its paintings, "Madonna and Child in a Landscape," by the German master Lucas Cranach the Elder, had been stolen by the Nazis and is actually owned by the heirs of a Viennese physician. In keeping with the Washington Principles, the Museum researched the question of provenance, working in cooperation with the Holocaust Claims Processing Office of the State of New York and the Commission for Art Recovery of the World Jewish Congress and is in the process of returning it.

On the international scene there has been some progress in

the area of art restitution. The Cultural Committee of the Council of Europe prepared model legislation on the return of Jewish cultural property, which the Parliamentary Assembly of the Council adopted last November. We hope this model will engender new legislation on this subject in European national parliaments, similar in scope to the groundbreaking restitution law adopted by Austria in 1998.

The ten national museums and galleries of the United Kingdom are engaged in intensive provenance research to discover works that fall into the category of looted art. They have published, or are publishing, lists of works in their collections, the whereabouts of which, following initial research, cannot with certainty be specified for the whole period 1933-45, and are appealing to the public for help in finding out more information about the provenance of these works. In addition, the United Kingdom has established a "Spoilation Advisory Panel" to hear claims for Nazi-confiscated art.

Germany's Cultural Minister of State recently announced that Germany will inaugurate a website to help restore Nazi-confiscated art to its rightful owners. All major German museums were called upon to inspect the provenance of the artwork in their possession. Any artwork — including coin collections and artifacts — that is found to have unclear provenance will be publicized, with pictures, on the website. Restitution would not be affected by the German Foundation Initiative. This German art initiative follows the lead of the web site the French government has operated for many years to display art returned to France after the War but never claimed.

The Lithuanian Government announced at the end of January that, under the auspices of the Council of Europe, it was inviting representatives of the world community to a forum on cultural properties of Holocaust victims to be held in Vilnius in October.

I would like to include for the record the implementing

principles adopted by the American Association of Museums entitled, "Guidelines Concerning the Unlawful Appropriations of Objects During the Nazi Era." I also ask that the Statement by the Federal German Government, the Laender (Federal States) and the national associations of local authorities on the tracing and return of Nazi-confiscated art, especially from Jewish property, be included in the record of this hearing.

In December 1998, at the Washington Conference, the Russian Delegation invited Holocaust survivors and their heirs to claim looted artwork captured by the Soviet Forces at the end of World War II. The Russian Constitutional Court has upheld legislation that would permit the restitution of art confiscated by the Nazis from victims of persecution. However, this will be a hollow commitment unless Russian art archives are opened. The Russian government subscribed to the Washington Principles on Art and has indicated a willingness to open these archives, but has not as yet done so, at least in part because of financial constraints. We have been approached by several groups interested in cooperating with the Russians on cataloguing art in Russian depositories. We encourage such an initiative and would be happy so facilitate such an effort. One idea is to create an NGO to make grants that would help establish a reliable database of Nazi confiscated art in Russia and assist in the identification of rightful owners.

Communal Property

During the Nazi era, the Germans seized a great deal of property in Central and Eastern Europe that belonged to religious organizations — churches and synagogues. The property was converted into commercial, social and municipal facilities. Jewish communal property was a particular target, as seizing it advanced the Nazi goal of eliminating all traces of Judaism and the Jewish people from the continent.

The successor communist governments for the most part did not restore these properties to their original owners but used them in much the same manner that the Nazis did. Thus when

the Iron Curtain was lifted, the new states of Central and Eastern Europe faced a massive task of deciding how to deal with this property, much of which had been exploited for non-religious purposes for over a half century.

Changing property ownership and use after such an extended period of time is a difficult and complex undertaking. At the same time, governments must realize that honoring property rights is a pre-requisite to participating in the international marketplace and in attracting investment from abroad. While this may be initially expensive and politically sensitive, sound property restitution systems are clearly in the interest of all the Central and Eastern European countries. The nations of Western Europe, as well as the U.S., adhere to high standards when it comes to private property rights, including restitution. As the Central and Eastern European countries are fully integrated into Western institutions, they should realize the importance of sound property restitution laws.

In my discussions with government officials since the mid-1990s, I have emphasized a number of principles that seem to me to be important in addressing property restitution issues. These principles include.

- Equitable, transparent and non-discriminatory procedures to evaluate specific claims.
- Access to archival records and use of alternative forms of evidence if primary documents no longer exist.
- Implementation of restitution policies at national, regional and municipal levels.
- Non-discriminatory procedures, without citizenship or residence requirements.
- Clear and simple legal procedures.
- Implementation of court decisions on the basis of equality and non-discrimination.

- Priority of restitution claims before privatization occurs.
- Provisions for the present occupants of restituted property.
- Transfer of clear title including the right of resale, not simply the right to use property, which could be revoked at a later time.
- Restitution or compensation for communal property irrespective of whether the property had a religious or secular use.
- Establishment of foundations, managed jointly by local communities and international groups, to aid in the preparation of claims and to administer restituted property.
- Protection of cemeteries and other religious sites.

Appended to my written testimony is a country-by-country summary of property restitution issues. There has been some progress since I commenced my activities in this area in 1995, but much remains to be done. Romania, for example, still lacks a comprehensive law on the restitution of private residential property. The newly independent states of the former Soviet Union have dealt with both private and communal property in only a cursory manner.

Poland merits more detailed attention because of the large amount of potentially restitutable private and communal property in that country and recent developments. In September of last year, the Polish government submitted to Parliament private property legislation that was non-discriminatory in terms of allowing former Polish citizens and their heirs who now live outside of Poland to file property claims. However, in December a parliamentary committee added restrictive residency requirements which we believe are discriminatory. We have raised this issue with senior visiting Polish officials here in Washington and our Embassy has raised it in Warsaw. In addition, I believe that Congressman Christopher Smith, Chairman of the Commission on Security and Cooperation in

Europe, sent a letter to the Polish Ambassador to the United States, and other Members of Congress have considered contacting the Parliament directly. Polish government officials have assured us that they strongly favor the draft submitted by the government and are opposed to the amendments. They have promised to work to restore its original intent before it is reported to the floor. Congress' help with the Polish Parliament would be very timely.

Notwithstanding the forthcoming attitude of the Polish government, communal property in Poland poses a special problem as the Holocaust and subsequent emigration has reduced the Jewish community in that country to approximately one percent of the pre-World War II population. The small remaining community has made substantial progress in claiming communal property but it was obvious at the time that communal property legislation was passed approximately three years ago that the community would not be able to claim, manage and maintain the property to which it was entitled without some outside assistance. The answer to this problem appeared to be the establishment of a joint foundation by the World Jewish Restitution Organization and the Polish Jewish communities. Negotiations between the two groups broke down last year. To get the two parties back to the negotiating table, I asked Ambassador Henry Clarke to serve as a mediator. In four negotiating sessions since last fall, Ambassador Clarke has helped the parties to find solutions to some of their differences. I am hopeful that the foundation can be organized in the near future. It would be tragic if further delays prevented the prompt return of communal property in Poland.

Historical Commissions

Eighteen nations currently have commissions examining their role during World War II, some of whom abetted the Nazi cause, gave haven to war criminals and facilitated the flow of confiscated assets. They are: Argentina, Austria, Belgium, Brazil, Croatia, Estonia, France, Italy, Latvia, Lithuania, the

Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, the United Kingdom, and the United States. In addition, the Government of Slovakia has agreed to create a commission. Some commissions have already made their reports, with varying degrees of thoroughness and candor. The most comprehensive thus far have been the two reports published by Switzerland, the first on how Swiss banks helped the Nazis use stolen gold to finance their war machine; and the second on how and why Swiss authorities closed the border to refugees attempting to flee Germany. In our own country, a Presidential Commission headed by Edgar Bronfman is investigating the circumstances under which Nazi money, property and other assets flowed through the hands of the U.S. Government during the War and particularly after the War.

Archives

Archival openness is essential, not only to assist in making claims and advancing scholarship, but so that every country can honestly confront its behavior during these difficult years and draw the lessons needed to advance tolerance and social justice. It is important, for example, that the Russians open up their archives on Raul Wallenberg and museums in all countries allow scholarly and provenance research into their collections.

At a conference in Stockholm last month, attended by delegates from 46 nations, a declaration was agreed to calling for opening up archives containing information on the Nazi-World War II era. In addition, following my request to Count Lambsdorff, he has informed me that many of the companies involved in the German slave/forced labor initiative have agreed to open their archives from this era to legitimate historical research. Some have done so already. We are encouraging the broadest participation of German companies in this effort at openness.

The Vatican has authorized a group of Jewish and Catholic scholars to thoroughly review its collection of published documents from the Nazi era, with the purpose of raising

appropriate issues. The Vatican is both a religious seat and a secular state conducting diplomatic relations. The questions that have been raised concerning Vatican policies during the Nazi era should relate solely to its latter role. This scholarly initiative is a small step forward toward archival openness, in keeping with Pope John Paul's inspirational leadership in bettering Catholic-Jewish relations, most recently exemplified by his moving words at the Holocaust Memorial at Yad Vashem and his symbolic appearance at the Western Wall during his recent trip to the Holy Land. We hope it will lead to additional measures for archival openness.

Education and Remembrance

As we proceed with addressing Holocaust-related issues, it is important to move from money to memory. The last word on the Holocaust should be the memory of its victims and the teaching of its enduring lessons. I had the distinct honor of leading the U.S. delegation to The Stockholm International Forum on the Holocaust in January. The Stockholm Forum, appropriately the first major conference of the new millennium, was an outstanding success and built upon the previous Holocaust conferences held in London and Washington. Twenty heads of state and government and delegations from 46 countries attended. Only his prior commitment to deliver the State of Union address prevented the President from attending.

Delegates committed their countries to promoting Holocaust education and remembrance, encouraging the study of the Holocaust in schools and universities, and in taking all necessary steps to open relevant archives. As embodied in the "Stockholm Declaration," a copy of which I enclose for the Record. These commitments, made by national political leaders, are unprecedented, and in the words of Holocaust survivors with whom I spoke, "monumental" and "historic." Argentina, Bulgaria, Latvia, and Lithuania requested the nine country International Holocaust Education Task Force to begin liaison projects on teaching the Holocaust with them, and,

along with Ukraine, expressed interest in Task Force membership.

The concept of the Stockholm Forum was the personal initiative of Swedish Prime Minister Persson. In addition to the leadership and inspiration he gave to the Forum, he also demonstrated exceptional political leadership in exploring the historical truth of Sweden's wartime neutrality and in remembering the horrible crimes of the Holocaust era.

The work of the International Holocaust Education Task Force continues. It is translating the experience and expertise gained in teaching the Holocaust in countries that are members of the Task Force to other countries, helping them to develop Holocaust education and remembrance in their societies. There has been a successful project in the Czech Republic aimed at training in the teaching of the Holocaust, and similar projects have been requested by other countries.

To help support such activities, the Task Force last month established an endowment fund, to be administered by the Swedish Ministry of Foreign Affairs. Our government strongly supports this fund, and hopes to be able to announce a contribution in the near future.

In the same Stockholm Declaration of which I spoke, the participating nations committed their countries to promoting Holocaust education and remembrance, and encouraging the study of the Holocaust in their schools and universities.

Presidential Commission on Holocaust Assets in the United States

Mr. Chairman, my friend and partner in many of these endeavors, Edgar M. Bronfman, is testifying here today in his role as Chairman of the Presidential Advisory Commission on Holocaust Assets in the United States. While I am a member of that Commission, I will defer to him and not address the Commission's work today.

I would like to note to the Committee that on March 28, the President sent to the Congress a supplemental appropriations bill that included $1.4 million for the Presidential Commission.

In the course of the Presidential Commission's work, we have discovered new areas of inquiry that must be examined. Among the projects the supplemental would support are a review of agreements that may have existed between the United States and Western European countries regarding the restitution of property to individuals; a review of bank and travel agent records of assets transferred to the United States by Holocaust victims; and the cross-matching of names of Holocaust victims with unclaimed property lists.

Because the Presidential Commission will deliver its final report by the end of December, it is extremely important that these authorized funds be appropriated as soon as feasible so that the Commission can make use of them while it is still conducting its research. We have urged other countries to establish historical Commissions to examine their own nations' role during that period. We have urged them to be complete and transparent in their research. We can do no less.

The Administration strongly supports this proposal, and I ask the members of the Senate to act on it expeditiously.

Nazi War Criminal Records Interagency Working Group

The Nazi War Crimes Disclosure Act calls for identification, declassification and public access to millions of pages of Nazi war criminal records by a deadline of January 2002. The Nazi War Criminal Records Interagency Working Group (IWG) oversees the project, which includes searching for records, analyzing them, monitoring and auditing the declassification process, maintaining a IWG database, preparing and describing the records for presentation to the public in usable form, and assuring that war-time records in poor physical condition survive to be seen by the public. This last includes copying, microfilming, digitizing, and

conservation treatment of highly acidic, yellowing, and crumbling wartime paper. The work the IWG is doing very important work, none more important to the public and to the future than assuring that the records survive.

APPENDIX H

Agreement
between the Government of the
Federal Republic of Germany and
the Government of the United States of
America concerning the Foundation
"Remembrance, Responsibility and the Future"

The Government of the Federal Republic
of Germany and the Government
of the United States of America

Intending to shape relations between their two States in a spirit of friendship and cooperation for the future and to successfully resolve issues stemming from the past,

Recognizing that the Federal Republic of Germany has, building on Allied legislation and in close consultation with victims' associations and interested Governments, provided, in an unprecedented manner, comprehensive and extensive restitution and compensation to victims of National Socialist persecution,

Noting the historic announcement on February 16, 1999, made by the Federal Chancellor and German companies, in which the companies stated their intention to establish a foundation to compensate forced laborers and others who suffered at the hands of German companies during the National Socialist era and World War II,

Noting that, by means of the Foundation Initiative, its member companies wish to respond to the moral responsibility of German business arising from the use of the forced laborers and from damage to property caused by persecution, and from all other wrongs suffered during the National Socialist era and World War II,

Recognizing as legitimate the interest German companies have in all-embracing and enduring legal peace in this matter, and

further recognizing that such interest was fundamental to the establishment of the Foundation Initiative,

Noting that the two Governments announced that they welcomed and support the Foundation Initiative,

Noting that the Federal Republic of Germany and German companies have since agreed on the creation of a single Foundation, "Remembrance, Responsibility and the Future" (the "Foundation"), formed under German federal law as an instrumentality of the Federal Republic of Germany and funded by contributions from the Federal Republic of Germany and the German companies,

Recognizing that German business, having contributed substantially to the Foundation, should not be asked or expected to contribute again, in court or elsewhere, for the use of forced laborers or for any wrongs asserted against German companies arising from the National Socialist era and World War II,

Recognizing that it is in the interest of both parties to have a resolution of these issues that is non-adversarial and non-confrontational, outside of litigation,

Recognizing that both parties desire all-embracing and enduring legal peace to advance their foreign policy interests,

Noting in this regard the June 16, 2000, letter of the Assistant to the President of the United States for National Security Affairs and the Counsel to the President of the United States and the July 5, 2000, letter of the Foreign Policy and Security Advisor of the Chancellor of the Federal Republic of Germany, copies of which have been made public,

Having worked as partners, in consultation with other interested parties and governments, to assist German companies to achieve wide support for the total amount of funds and the eligibility criteria of the Foundation and for the establishment of all-embracing and enduring legal peace,

Noting that the Foundation will assure broad coverage of

victims and broad participation by companies which would not be possible through judicial proceedings,

Believing that the Foundation will provide as expeditious as possible a mechanism for making fair and speedy payments to now elderly victims,

Having in mind that the Foundation covers, and that it would be in the interests of both parties for the Foundation to be the exclusive remedy and forum for addressing, all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II,

Recalling that for the last 55 years the parties have sought to work to address the consequences of the National Socialist era and World War II through political and governmental acts between the United States and the Federal Republic of Germany,

Noting that this Agreement and the establishment of the Foundation represent a fulfillment of these efforts,

Recognizing that the German Government has tabled a Bill before the German Federal Parliament ("Bundestag") to establish the Foundation —

Have agreed as follows:

Article 1

(1) The parties agree that the Foundation "Remembrance, Responsibility and the Future" covers, and that it would be in their interests for the Foundation to be the exclusive remedy and forum for the resolution of, all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II.

(2) The Federal Republic of Germany agrees to ensure that the Foundation shall provide appropriately extensive publicity concerning its existence, its objectives and the availability of funds.

(3) Annex A sets forth the principles that shall govern the operation of the Foundation. The Federal Republic of Germany assures that the Foundation will be subject to legal supervision by a German governmental authority; any person may request that the German governmental authority take measures to ensure compliance with the legal requirements of the Foundation.

(4) The Federal Republic of Germany agrees that insurance claims that come within the scope of the current claims handling procedures adopted by the International Commission of Holocaust Era Insurance Claims ("ICHEIC") and are made against German insurance companies shall be processed by the companies and the German Insurance Association on the basis of such procedures and on the basis of additional claims handling procedures that may be agreed among the Foundation, ICHEIC, and the German Insurance Association.

Article 2

(1) The United States shall, in all cases in which the United States is notified that a claim described in article 1(1) has been asserted in a court in the United States, inform its courts through a Statement of Interest, in accordance with Annex B, and, consistent therewith, as it otherwise considers appropriate, that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving such claims asserted against German companies as defined in Annex C and that dismissal of such cases would be in its foreign policy interest.

(2) The United States, recognizing the importance of the objectives of this agreement, including all-embracing and . during legal peace, shall, in a timely manner, use its best efforts, in a manner it considers appropriate, to achieve these objectives with state and local governments.

Article 3

(1) This agreement is intended to complement the creation of

the Foundation and to foster all-embracing and enduring legal peace for German companies with respect to the National Socialist era and World War II.

(2) This agreement shall not affect unilateral decisions or bilateral or multilateral agreements that dealt with the consequences of the National Socialist era and World War II.

(3) The United States will not raise any reparations claims against the Federal Republic of Germany.

(4) The United States shall take appropriate steps to oppose any challenge to the sovereign immunity of the Federal Republic of Germany with respect to any claim that may be asserted against the Federal Republic of Germany concerning the consequences of the National Socialist era and World War II.

Article 4

Annexes A, B and C shall be an integral part of this Agreement.

Article 5

This Agreement shall enter into force on the date on which the parties agree by exchange of notes.

DONE at Berlin on the 17th day of July 2,000, in duplicate in the German and English languages, both texts being equally authentic.

For the Government of the Federal Republic of Germany
/s/

For the Government of the United States of America
/s/

Annex A
of the Agreement between
the Government of the Federal Republic
of Germany and the Government of the
United States of America concerning the Foundation
"Remembrance, Responsibility and the Future"

Principles Governing the Operation of the Foundation

Article 1(3) of the Agreement provides that the principles governing the operation of the Foundation will be set forth in Annex A. This Annex reflects key elements of the Foundation that form a basis for the Parties' mutual commitments in the Agreement.

1. The Foundation legislation will state that the purpose of the Foundation is to make payments through partner organizations to those who suffered as private and public sector forced or slave laborers and those who suffered at the hands of German companies during the National Socialist era and to establish a "Remembrance and Future Fund" within the Foundation. It will state that the permanent task of the "Remembrance and Future Fund" is to support projects that (a) serve to promote understanding between nations, and serve social justice and international cooperation in the humanitarian sector; (b) support youth exchange programs and keep alive the memory of the Holocaust and the threat posed by totalitarian, unlawful regimes and tyranny; and (c) also benefit heirs of those who have not survived.

2. The Foundation legislation will provide for a Board of Trustees that consists of an equal number of members appointed by the German Government and German companies and by other governments and victims' representatives, except that the Chairman shall be a person of international stature appointed by the Chancellor of the Federal Republic of Germany. The Board may be reduced in size after four years, but the balance of the membership

will continue, to the extent appropriate. The Board will adopt by-laws by a two-thirds majority vote. All Foundation operations will be transparent and by-laws and similar procedures will be made public.

3. The Foundation legislation will provide that the Foundation will be audited by the Federal Accounting Office and that all partner organizations will also be audited.

4. The Foundation legislation will provide that persons who were held in concentration camps as defined under the Federal Compensation Law ("BEG") or in another place of confinement or ghetto under comparable conditions and were subject to forced labor ("slave laborers") will be eligible to receive up to DM 15,000 each. The Foundation legislation will also provide that persons who were deported from their homelands into the territory of the 1937 borders of the German Reich or to a German-occupied area, and were held in prison-like or extremely harsh living conditions ("forced laborers") not covered by the above definition will be eligible to receive up to DM 5,000 each. In addition, from the allocated funds to make payments to forced laborers, partner organizations will be authorized to make payments to others who were forced to work during the National Socialist era. These other forced laborers will receive up to DM 5,000 each. The eligibility of all laborers covered by the Foundation will be limited to survivors and heirs, as defined under paragraph 8, of those who died after February 15, 1999. In addition, victims of "other non-labor personal injury wrongs," including, but not limited to, medical experimentation and *Kinderheim* cases, will be eligible to receive payments, within the limits of the amount allocated for that purpose. Victims of medical experimentation and *Kinderheim* cases are given priority over other non-labor personal injury wrongs. The eligibility of a victim to receive benefits for all "other non-labor personal injury wrongs" will not be affected by whether or not he or she

also receives benefits for forced labor. The funds allocated for "other non-labor personal injury wrongs" will constitute a separate allocation. The partner organizations will receive, review, and process applications for payments from the amount allocated for "other personal injury." At the request of a partner organization, the property committee referred to in paragraph 11 will appoint an independent arbitrator to review and process applications to the particular partner organization. The amount allocated will be distributed to each partner organization so that each approved applicant is provided a pro-rata amount of the total amount for all approved "other personal injury" applicants. The decisions of the partner organizations and any arbitrator that may be appointed will be based on uniform standards approved by the Board of Trustees. The F ndation legislation will provide that any costs associated with reviewing and processing applications, including those associated with an arbitrator (if selected), will be drawn from the allocations for each partner organization. Excess amounts in the labor category allocated to any partner organization under the distribution plan annexed to the Joint Statement will be reallocated to labor, with the aim of reaching equal levels of payments to former slave and forced laborers wherever they reside. The Board of Trustees will be entitled to authorize payments above per capita ceilings should circumstances warrant.

5. The Foundation legislation will provide that a slave or forced laborer will not be able to receive payments for the same injury or wrong from both the Foundation and the Austrian Foundation for Reconciliation, Peace and Cooperation.

6. The Foundation legislation will provide that persons who suffered loss of or damage to property during the National Socialist era as a result of racial persecution directly caused by German companies are eligible to recover under the payment system set forth in paragraph 11. The eligibility of

such persons will be limited to those who could not receive any payment under the BEG or Federal Restitution Law ("BRueckG") because they did not meet the residency requirement or could not file their claims by the deadline because they lived under a government with which the Federal Republic of Germany did not have diplomatic relations, those whose claims were rejected under the BEG or BRueckG where legal proof became available only after the reunification of the Federal Republic of Germany, provided the claims were not covered by post-reunification restitution or compensation legislation, and those whose racially-motivated property claims concerning moveable property were denied or would have been denied under the BEG or BRueckG because the claimant, while able to prove a German company was responsible for seizing or confiscating property, was not able to prove that the property was transferred into then-West Germany (as required by law) or, in the case of bank accounts, that compensation was or would have been denied because the sum was no longer identifiable, where either (a) the claimant can now prove the property was transferred into then-West Germany or (b) the location of the property is unknown.

7. The Foundation legislation, by making available the amount of 50 million DM, will provide a potential remedy for all non-racially motivated wrongs of German companies directly resulting in loss of or damage to property during the National Socialist era. The Foundation will refer such matters for review and processing to the committee referred to in paragraph 11. All funds allocated to payment for property matters will be distributed within those categories.

8. The Foundation legislation will provide that the heirs eligible to receive payments under paragraphs 6 and 7 consist of the spouse or children. In the absence of the victim, spouse and children, then payments under these

paragraphs will be available to grandchildren, if alive; if not, to siblings, if alive; and if there are neither grandchildren nor siblings, to the individual beneficiary named in a will.

9. The Foundation legislation will provide that all eligibility decisions will be based on relaxed standards of proof.

10. The Foundation legislation will provide that legal persons will be allowed to make claims on behalf of individuals when those individuals have given powers of attorney. The Foundation legislation will also provide that where an identifiable religious community has suffered damage to or loss of community property, as distinct from individual property, resulting directly from the wrongs of a German company, a duly authorized legal successor may apply for payment to the committee referred to in paragraph 11.

11. The Foundation legislation will establish a three-member committee for property matters (paragraphs 6 and 7). The United States and the Federal Republic of Germany will each appoint one member; these two members will appoint a Chairman. A secretariat will be largely responsible for the initial review of applications. The Foundation legislation will require the Committee to establish simplified procedures, including simplified and expedited internal appeals. The Committee will not have the authority to reopen any case that has been finally decided by a German court or administrative body, or that could have been decided by application in time, except as specified in paragraph 6. All of the Committee's expenses will be funded from the amount allocated for property claims and the funds will be subject to audit.

12. The Foundation legislation will provide that the Committee referred to in paragraph 11 will distribute the funds allocated to it on a pro-rata basis.

13. The Foundation legislation will make clear that receipt of

payment from Foundation funds will not affect the recipient's eligibility for social security or other public benefits. There will be offsets for prior compensation payments made by German companies for forced labor and other National Socialist era injustices, even if made through third parties, but there will be no offsets for any prior Government payments.

14. The Foundation legislation will provide that each applicant for a Foundation payment will be required to state that, upon receipt of a payment from the Foundation, he or she will waive any and all alleged National Socialist era claims against German companies and all National Socialist era labor and property damage claims against the German Government. Such a waiver will not preclude applicants from being eligible to receive payments under the Foundation legislation for other wrongs, for example other personal injuries or loss of property, or any combination thereof. Such a waiver also will not preclude an applicant from bringing an action against a specific German entity (i.e., Government agency or company) for the return of a specifically identified piece of art if the action is filed in the Federal Republic of Germany or in the country in which the art was taken, provided that the applicant is precluded from seeking any relief beyond or other than the return of the specifically identified piece of art.

15. The Foundation legislation will provide that each partner organization will create an internal appeals procedure.

16. The Foundation legislation will require that the Foundation provide appropriately extensive publicity concerning the benefits that the Foundation will offer and how to apply. The Board of Trustees, in consultation with the partner organizations, will determine the form and content of such publicity.

17. The Foundation legislation will allow applications to be made to the partner organizations for at least eight months

after the enactment of the Foundation law.

18. The Foundation legislation will authorize the Foundation and its partner organizations to receive information from German Government agencies and other public bodies that is necessary for the fulfillment of their responsibilities, in so far as this is not contrary to particular statutes or regulations or the legitimate interests of the persons concerned.

19. The Foundation legislation will enter into force no later than when the funds of the Foundation are made available to it.

Annex B
of the Agreement between
the Government of the Federal Republic of
Germany and the Government of the
United States of America concerning the Foundation
"Remembrance, Responsibility and the Future"

Elements of U.S. Government Statement of Interest

Pursuant to Article 2, Paragraph 1, the United States will timely file a Statement of Interest and accompanying formal foreign policy statement of the Secretary of State and Declaration of Deputy Treasury Secretary Stuart E. Eizenstat in all pending and future cases, regardless of whether the plaintiff(s) consent(s) to dismissal, in which the United States is notified that a claim has been asserted against German companies arising from the National Socialist era and World War II.

The Statement of Interest will make the following points:

1. As indicated by his letter of December 13, 1999, the President of the United States has concluded that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II, including without limitation those relation to slave and forced labor, Aryanization, medical experimentation, children's homes/*Kinderheim*, other cases of personal injury, and damage to or loss of property, including banking assets and insurance policies.

2. Accordingly, the United States believes that all asserted claims should be pursued (or in the event Foundation funds have been exhausted, should timely have been pursued) through the Foundation instead of the courts.

3. As the President said in his letter of December 13, 1999, dismissal of the lawsuit, which touches on the foreign

policy interests of the United States, would be in the foreign policy interests of the United States. The United States will recommend dismissal on any valid legal ground (which, under the U.S. system of jurisprudence, will be for the U.S. courts to determine). The United States will explain that, in the context of the Foundation, it is in the enduring and high interest of the United States to support efforts to achieve dismissal of all National Socialist and World War II era cases against German companies. The United States will explain fully its foreign policy interests in achieving dismissal, as set forth below.

4. The United States' interests include the interest in a fair and prompt resolution of the issues involved in these lawsuits to bring some measure of justice to the victims of the National Socialist era and World War II in their lifetimes; the interest in the furtherance of the close cooperation this country has with our important European ally and economic partner, Germany; the interest in maintaining good relations with Israel and other Western, Central, and Eastern European nations, from which many of those who suffered during the National Socialist era and World War II come; and the interest in achieving legal peace for asserted claims against German companies arising from their involvement in the National Socialist era and World War II.

5. The Foundation is a fulfillment of a half-century effort to complete the task of bringing justice to victims of the Holocaust and victims of National Socialist persecution. It complements significant prior German compensation, restitution, and pension programs for acts arising out of the National Socialist era and World War II. For the last 55 years, the United States has sought to work with Germany to address the consequences of the National Socialist era and World War II through political and governmental acts between the United States and Germany.

6. The participation in the Foundation not only by the German Government and German companies that existed during the National Socialist era, but also by German companies that did not exist during the National Socialist era, allows comprehensive coverage of slave and forced laborers and other victims.

7. Plaintiffs in these cases face numerous legal hurdles, including, without limitation, justiciability, international comity, statutes of limitation, jurisdictional issues, *forum non conveniens*, difficulties of proof, and certification of a class of heirs. The United States takes no position here on the merits of the legal claims or arguments advanced by plaintiffs or defendants. The United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal, but will reinforce the point that U.S. policy interests favor dismissal on any valid legal ground.

8. The Foundation is fair and equitable, based on: (a) advancing age of the plaintiffs, their need for a speedy, non-bureaucratic resolution, and the desirability of expending available funds on victims rather than litigation; (b) the Foundation's level of funding, allocation of its funds, payment system, and eligibility criteria; (c) the difficult legal hurdles faced by plaintiffs and the uncertainty of their litigation prospects; and (d) in light of the particular difficulties presented by the asserted claims of heirs, the programs to benefit heirs and others in the Future Fund.

9. The structure and operation of the Foundation will assure (or has assured) swift, impartial, dignified, and enforceable payments; appropriately extensive publicity has been given concerning its existence, its objectives, and the availability of funds; and the Foundation's operation is open and accountable.

Annex C
of the Agreement between
the Government of the Federal Republic of
Germany and the Government of the
United States of America concerning the Foundation
"Remembrance, Responsibility and the Future"

Definition of "German Companies"

"German companies," as used in Article 1(1) and Article 2(1), are defined as in Sections 12 and 16 of the legislation establishing the Foundation "Remembrance, Responsibility and the Future," as follows:

1. Enterprises that had their headquarters within the 1937 borders of the German Reich or that have their headquarters in the Federal Republic of Germany, as well as their parent companies, even when the latter had or have their headquarters abroad.

2. Enterprises situated outside the 1937 borders of the German Reich in which during the period between January 30, 1933, and the entry into force of the legislation establishing the Foundation "Remembrance, Responsibility and the Future," German enterprises as described in Sentence (1) had a direct or indirect financial participation of at least 25 percent.

3. "German companies" does not include foreign parent companies with headquarters outside the 1937 borders of the German Reich in any case in which the sole alleged claim arising from National Socialist injustice or World War II has no connection with the German affiliate and the latter's involvement in National Socialist injustice, unless there is pending a discovery request by plaintiff(s), of which the United States is provided notice by the defendant with copy to plaintiff(s), seeking discovery from or concerning World War II or National Socialist era actions of the German affiliate.

APPENDIX I

NEWS

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release March 29, 2001

JOINT STATEMENT BY
PRESIDENT GEORGE W. BUSH AND
CHANCELLOR GERHARD SCHROEDER ON A
TRANSATLANTIC VISION FOR THE 21ST CENTURY

The United States of America and the Federal Republic of Germany are linked by a deep friendship. Our meeting today opens a new chapter in our close relationship. At the beginning of the 21st century, we reaffirm our common commitment to the lasting principles which are at the basis of the Transatlantic community of values – freedom, democracy and human rights. On this basis, we are resolved to strengthen and further develop the partnership between the United States of America and Europe. In the age of globalization we want to give it a new quality.

We agree that our cooperation within the Atlantic Alliance continues to be of decisive importance for the security and stability of the Euro-Atlantic region and that this includes an adequate military presence of the United States in Europe. The Atlantic Alliance has adapted itself to the historic changes in Europe after the end of the Cold War and today also plays an important role in promoting stability in the states of Central, Eastern, and Southeastern Europe. The openness of the Alliance for new members and its offer of a comprehensive partnership to the new democracies on the European continent contribute to peace and security in all of Europe. They are directed against

no one.

We share the view that Russia can make an important contribution to maintaining peace and stability in Europe and the world. We encourage the Russian government to further pursue a policy of democratic reforms and offer our cooperation to this end.

We will be partners for the states in Southeastern Europe on their way into a peaceful future. War, aggressive nationalism and extremist acts of violence must belong to the past. We will lend our support to the process of stabilization and democratization in the Balkans, continuing to act in close consultation and jointly. In these efforts, the Stability Pact will continue to play a central role.

Both our countries have long-standing commitments to the territorial integrity of Macedonia. We strongly condemn the violence perpetrated by a small group of extremists trying to destabilize that country's democratic, multi-ethnic government. Their violent methods are hurting the long-term interests of ethnic Albanians in Macedonia, Kosovo, and throughout the region. We strongly support President Trajkovski and the Macedonia government in taking proportionate steps to prevent further violence and urge that they work closely with elected representatives of the Macedonian Albanian community to address legitimate minority concerns. We welcome steps being taken by NATO, the European Union, and the OSCE to help Macedonia contain the insurgents as well as to facilitate a political solution.

We are convinced that the uniting Europe will enrich Transatlantic relations. From the beginning, the United States of America has offered its support to European unification, for a Europe that is strong and capable lies in the interest of the United States just as much as Europe needs a strong American partner. Therefore we view the development of a European Security and Defense Policy as an important contribution to sharing the burden of securing peace which will strengthen the

Atlantic Alliance.

The United States and Germany welcome the efforts of the European Union to assume greater responsibility for crisis management by strengthening capabilities and developing the ability to take actions where NATO as a whole chooses not to engage. In this regard, the United States welcomes the European Union's European Security and Defense Policy (ESDP), aiming at making Europe a stronger, more capable partner in deterring and managing crises affecting the security of the Transatlantic community. This involves:

- Developing EU capabilities in a manner that is fully coordinated, compatible, and transparent with NATO;
- The fullest possible participation by non-EU European NATO members in the operational planning and execution of EU-led exercises and operations, reflecting their shared interests and security commitments as NATO members;
- Working with other EU members to improve Europe's capabilities and enables the EU to act where NATO as a whole is not engaged.

Together we are resolved to undertake new efforts in countering the proliferation of weapons of mass destruction (WMD) and increasingly sophisticated missiles for their delivery. We agree on the need for substantive bilateral consultations, as well as close consultations with other allies and interested parties. We will work together toward a post-Cold War strategy that increases our common security and that encompasses the appropriate mix of offensive and defensive systems, and that continues nuclear arms reductions and strengthens WMD and missile proliferation controls as well as counter-proliferation measures.

We are resolved to increase our efforts to abolish barriers impeding trade between the European Union and the United States of America. In areas where we have differences of opinion we will strive to bring our positions closer together.

In the framework of G-7/8 we will contribute to helping the poorest countries in drawing more benefit from technological development, in particular in the field of information technology. Together we will also increase our efforts towards bringing about a stable global finance system. This will also be of help in overcoming hunger, poverty, and disease in large parts of the world that represent a challenge to all of us.

We share a common concern about global climate change. We openly note that we differ on the best way to protect the earth's climate. The Federal Republic of Germany, host of the Climate Change Conference in Bonn in July, emphasizes that the targets to reduce greenhouse gases agreed in Kyoto are indispensable to combat global climate change effectively. The United States opposes the Kyoto Protocol because it exempts many countries from compliance and would cause serious harm to the American economy. Both sides, however, are prepared to work constructively with friends and allies to solve the problem. In this context they deem it necessary to develop, among other means, technologies, market-based incentives, and other innovative approaches to meeting the challenge of global climate change.

We attach particular importance to the fight against HIV/AIDS. We want the G-7/8 to intensify their efforts to ease the suffering of millions of people who are inflicted by this disease. We consider it to be of particular importance for the pharmaceutical industry to take additional measures so that HIV/AIDS patients in affected developing countries can be supplied with medication at affordable prices.

We welcome the agreements on the establishment of the German Foundation Remembrance, Responsibility, and the Future for compensation payments to former forced laborers. We note with great satisfaction that the German companies now have made available their total share in the Foundation. We call for a swift implementation of the agreements on all-embracing and enduring legal peace so that payments to the aged former

forced laborers can begin as soon as possible.

German-American friendship constitutes a pillar of Transatlantic relations. It must continue to be based on broad popular support in the new century. To this end, we will, on both sides of the Atlantic, encourage even more contacts among members of the younger generation.

APPENDIX J

Statement
by
Ambassador Randolph M. Bell
Special Envoy for Holocaust Issues
U.S. Department of State
Washington, DC

to the
U.S. House of Representatives
Committee on Government Reform
Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations

September 24, 2002

Mr. Chairman, I appreciate the opportunity to appear before the subcommittee today concerning H.R. 2693, the "Holocaust Victims Insurance Relief Act." The United States Government is committed to securing equitable compensation for Holocaust victims. In pursuit of that goal, we have facilitated prolonged, intense international negotiations and entered into several bilateral agreements to secure speedy resolution of claims. We recognize the importance of ensuring that unpaid insurance policies, issued in Europe during the Holocaust era, are honored, and we have worked steadily to support international cooperative efforts to address and resolve Holocaust-era insurance issues. We recognize and salute the active role of the United States Congress in this cooperative effort.

While we appreciate the purpose behind H.R. 2693 — to provide information about Holocaust-era insurance policies to potential claimants — we have serious concerns with this legislation and the negative impact it could have on the implementation of agreements we have concluded with several countries for the specific purpose of securing payment of

survivors' claims.

This legislation's demand for information from European companies on activities that took place in Europe more than 50 years ago, under the threat of sanctions, is contrary to longstanding U.S. policy that matters of Holocaust-era restitution and compensation should be resolved through negotiation, cooperation and dialogue. If passed, this legislation could hinder or prevent important work that a number of established institutions are undertaking to help provide a dignified measure of justice to Holocaust survivors and their families worldwide.

This legislation also would undermine our policy of support for the International Commission on Holocaust Era Insurance Claims ("ICHEIC"), which has reached agreements with European insurers on publication of lists of policyholders who were likely to have been victims of Nazi persecution and has conducted research into public archives throughout Europe and published the results on the Internet. The mandate for broad disclosure of information regarding all policies issued in Europe from 1933 to 1945 — as opposed to information only on those policies issued to individuals who were likely to have been Holocaust victims — could result in the publication of thousands of names of individuals whose claims would not be eligible for payment and the subsequent creation of unrealistic public expectations. It is also highly likely that some policyholders and/or their heirs will object strenuously to publication on the grounds that it violates their privacy.

U.S. Policy

With regard to claims for restitution or compensation by Holocaust survivors and other victims of the Nazi era, it is the policy of the U.S. Government that concerned parties, foreign governments, and nongovernmental organizations should act to resolve matters of Holocaust-era restitution and compensation through dialogue, negotiation and cooperation. Since the end of World War II, the United States has worked in numerous ways

to achieve restitution and compensation for Nazi victims. These efforts also include the work of the United States military during the immediate postwar period.

Recent activities include negotiations that culminated in the creation, under German law, of the Foundation, "Remembrance, Responsibility and the Future" ("Foundation"). In addition to the Foundation, the United States also has encouraged participation in the International Commission on Holocaust Era Insurance Claims (ICHEIC), a voluntary organization that has established procedures for the processing and payment of Holocaust-era insurance claims. As part of the German Foundation agreement, the German Government agreed that insurance claims against German insurance companies will be processed on the basis of claims-handling procedures established by the ICHEIC and any other procedures that have been agreed among ICHEIC, the Foundation, and the German Insurance Association ("GDV"). A 2001 bilateral U.S. agreement with Austria provides that up to $25 million will be made available from the Austrian General Settlement Fund to cover claims against those Austrian insurance companies that are not already covered through ICHEIC or the German Foundation, and that claims will be processed by an independent panel using ICHEIC claims-handling procedures. In addition, under the U.S.-Swiss Joint Economic Commission ("JEC"), our two countries pledged to support the efforts of the ICHEIC to address Holocaust-era insurance issues expeditiously.

ICHEIC is a voluntary organization that was established in October of 1998 by the National Association of Insurance Commissioners ("NAIC"), in conjunction with several European insurance companies, European regulators, representatives of several Jewish organizations, and the State of Israel. The Association of Insurers in the Netherlands later joined ICHEIC on behalf of the entire Dutch insurance industry. The entire German and Austrian insurance industries are committed to using ICHEIC procedures for Holocaust-era

claims as described above.

The U.S. Government has supported ICHEIC since its establishment and believes that it should be viewed as the exclusive remedy for unresolved insurance claims from the National Socialist era and World War 11.

Since April 2000, ICHEIC has published 59,244 names (relevant to 86,472 insurance policies) in a searchable format on its website, www.icheic.org. The names come from a variety of sources, including research ICHEIC conducted in various European public archives and from lists of policyholders that were provided by ICHEIC member companies and then cross-matched with Yad Vashem's database of Holocaust victims. ICHEIC is expected to publish an additional 2,000 names on its website this week.

The United States welcomed the September 19 announcement by ICHEIC Chairman Lawrence S. Eagleburger that an agreement had been reached with the German Foundation on the processing and payment of insurance claims against the entire German insurance industry. The Administration has strongly supported efforts to conclude the insurance agreement so that valid claims can be paid and humanitarian funds distributed during claimants' lifetimes. With this agreement, some $100 million from the German Foundation will be made available to pay valid insurance claims against German companies and $175 million will be distributed by ICHEIC for humanitarian purposes.

A chief component of the ICHEIC-Foundation agreement includes detailed provisions for former Jewish residents of Germany and their heirs to soon have access to the most comprehensive listing ever available of insurance policies issued to Jewish residents of Germany during the National Socialist era. The listing will be developed using information on Jews living in Germany from the 1939 national census that has been compiled by the German Federal Archive, as well as emigration and deportation lists and other registers of German

Holocaust victims from various archival sources that have been recommended by experts. German insurance companies with existing electronic databases will provide information on policyholders, which will be matched with the listing compiled from the census and archival registers. Furthermore, the agreement provides that the ICHEIC claims database, which contains a significant percentage of claims that do not name a specific company, will be cross-matched with an electronic list of policies provided by German insurance companies.

As is the case with names currently published on ICHEIC's website, the listing generated from the provisions in the ICHEIC-Foundation agreement will be used to assist potential claimants. All actual claims will be researched by the companies using all of their records, regardless of whether the names are in an electronic format.

The U.S. Government understands that the members of ICHEIC — especially those representatives of the Conference on Jewish Material Claims Against Germany, the Jewish Agency for Israel, representatives of the State of Israel, U.S. state insurance regulators, and individuals who are themselves Holocaust survivors — all accept the ICHEIC-Foundation agreement as a valid and worthy result. They have endorsed the agreement's key provisions for publishing the most comprehensive list possible of German policyholders who may have been Holocaust victims.

All parties within ICHEIC have worked intensely for the past two years with the German Foundation to resolve the details of cooperation and establish a credible resolution mechanism for claims made against all German insurance companies. If passed, H.R. 2693 would undermine the agreement between ICHEIC and the Foundation, as well as ICHEIC's previous efforts — all of which have been supported by victims' and other Jewish organizations and U.S. state insurance regulators — to publish the names of policyholders who were likely to have been Holocaust victims.

We share the frustration of many with the slow pace of progress on paying Holocaust-era insurance claims. But after two years of negotiations, the parties have reached an agreement to do exactly what this legislation seeks to have them do — that is, to create usable lists of Holocaust-era insurance policies to facilitate the filing and payment of claims. That agreement should be given the opportunity to succeed. This legislation, however, would impose contradictory obligations, and potentially undermine the cooperation on which the recent agreement is based. In other words, passage of this legislation could frustrate or prevent attainment of the very goals it seeks to achieve.

Although based on legitimate concern for Holocaust survivors, sanctions such as those envisioned by H.R. 2693 divert attention from cooperation to confrontation and could undermine the work of the German Foundation, the ICHEIC and the Austrian General Settlement Fund and the objectives of the U.S.-Swiss Joint Economic Commission. Threats interfere with the conduct of international business, especially in the cases of insurance companies that have agreed to participate in the ICHEIC claims process to pay outstanding claims from the National Socialist era. Punitive measures will shift the focus away from the claims resolution we all desire to a debate over those actions.

In conclusion, it is the Department of State's view that H.R. 2693 would not be in the best interests of claimants on Holocaust-era insurance policies, many of whom are elderly Holocaust survivors, who have waited for justice that has been too long denied. I urge you, Mr. Chairman, and members of the subcommittee, to take this into account during your consideration of a bill that puts undue pressure on European insurers to report to the Department of Commerce, rather than through internationally agreed channels, and detracts from the public interest in furthering the purposes of institutions that have widespread national and international support and seek to help claimants receive a measure of justice in their lifetimes.

I thank you for the opportunity to appear before you today.

No. 02-722

Supreme Court U.S.
FILED
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In The
Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION,
AMERICAN RE-INSURANCE COMPANY, *et al.*,

Petitioners,

v.

HARRY W. LOW, in his capacity as Commissioner of Insurance for the State of California,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Holocaust Victim Insurance Relief Act (the "HVIRA") – a California statute that imposes reporting requirements upon insurance companies doing business in California, and does not seek to influence, insult or comment upon any foreign government – is constitutional under the dormant foreign affairs power.

2. Whether the HVIRA, a reporting statute that does not regulate either foreign transactions or foreign insurance companies, exceeds California's legislative jurisdiction under the Due Process Clause.

3. Whether the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, which insulates state regulation of the business of insurance from challenge under the dormant Commerce Clause, forecloses petitioners' dormant Commerce Clause challenge to the HVIRA, and if not, whether the HVIRA violates the dormant Commerce Clause.

LIST OF PARTIES

Respondent Harry W. Low is the Commissioner of Insurance for the State of California (the "Commissioner"). The Commissioner accepts the petitioners' "List of Parties and Rule 29.6 Statement."

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BRIEF IN OPPOSITION

Respondent Harry W. Low, in his capacity as the Commissioner of Insurance of the State of California (the "Commissioner"), respectfully requests that this Court deny the Petition for a Writ of Certiorari filed by the American Insurance Association, *et al.* ("AIA"), Assicurazioni Generali S.p.A. ("Generali"), and Winterthur International America Insurance Company, *et al.* (collectively, the "AIA Petitioners"), which is docketed as No. 02-722 (the "AIA Petition"). The Commissioner also opposes the Petition for a Writ of Certiorari filed by Gerling Global Reinsurance Corporation of America, *et al.* ("Gerling"), which involves the same decisions below and is docketed as No. 02-733 (the "Gerling Petition").

In the consolidated proceedings below, the AIA Petitioners and Gerling brought identical challenges to a California statute, the Holocaust Victim Insurance Relief Act ("HVIRA"), California Insurance Code §§ 13800-13807. The Court of Appeals upheld the HVIRA against all their challenges. Now, the AIA Petitioners and Gerling bring separate petitions for a Writ of Certiorari, appealing between them five of the adverse rulings below.

The AIA Petitioners and Gerling both appeal from rulings upholding the HVIRA against the claim that it invades the federal foreign affairs power and that it exceeds California's legislative jurisdiction under the Due Process Clause. Only the AIA Petitioners appeal from the ruling that the statute does not violate the dormant Commerce Clause.[1] Only Gerling appeals from rulings that the statute violates neither substantive nor procedural due process.

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[1] Although Gerling did not present the Commerce Clause question to this Court for review, it "join[s] in and fully adopt[s] the questions presented and arguments set forth in the [AIA Petition]." Gerling Petition at 3 fn.3. The Commissioner addresses the petitioners' appeal from the ruling upholding the HVIRA against their Commerce Clause challenges in this Brief (Section IV).

In this Brief, the Commissioner argues that neither the foreign affairs claim nor Commerce Clause claim merits a grant of certiorari. In his Brief in Opposition to the Gerling Petition, the Commissioner argues that neither the legislative jurisdiction claim nor either of the other due process claims merits a grant of certiorari. The Commissioner also argues in that Brief, in response to an argument made only by Gerling with respect to its foreign affairs claim, that the HVIRA does not interfere with U.S. obligations under the General Agreement of Trade in Services (GATS).

For convenience, the Commissioner includes similar preliminary Statements in both Briefs. To avoid any additional duplication, this Brief simply references the legislative jurisdiction argument that the Commissioner makes in his Brief in Opposition to the Gerling Petition, and the Brief in Opposition to the Gerling Petition references the foreign affairs arguments the Commissioner makes in this Brief. The Commissioner has attached an identical Appendix to each Brief.

OPINIONS BELOW

The Commissioner accepts the petitioners' statement of the "Opinions Below."

JURISDICTION

The Commissioner accepts the petitioners' statement of "Jurisdiction."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

The dormant foreign affairs power, which is not found in any provision of the Constitution but which, in limited circumstances, has been implied from the nature of federalism.

The Due Process Clause and the Commerce Clause, reproduced in the appendix attached to the AIA Petition at 114a.

Federal Statutes

The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (2000), reproduced in the attached appendix at Resp. App. 1-3.

The U.S. Holocaust Assets Commission Act of 1998, Pub. L. 105-186, 112 Stat. 611, as amended Pub. L. 106-155, § 2, 113 Stat. 1740 (1999) (codified at 22 U.S.C. § 1621 note (2000)), reproduced in the attached appendix at Resp. App. 4-16.

State Statute

The Holocaust Victim Insurance Relief Act of 1999, Cal. Ins. Code §§ 13800-13807 (2002), reproduced in the attached appendix at Resp. App. 17-22.

STATEMENT

For more than 55 years, Holocaust survivors have been stonewalled by insurance companies from which they have sought information. California is home to thousands of Holocaust survivors. ER 1699-1706.[2] These survivors are elderly and many live in poverty. App. at 23a;[3] ER 1699, 1700. Many are beneficiaries of insurance policies issued in Europe before World War II. ER 1700-1701; Resp. App. at 23.[4] In most instances, the survivors and their families no longer have proof of that insurance, and the only remaining information is in the hands of insurers. Yet, many insurers have refused to make that information available, while at the same time denying numerous claims because the

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[2] "ER" refers to the Excerpts of Record in the permanent injunction appeal.

[3] "App." refers to the Appendix to the AIA Petition.

[4] "Resp. App." refers to the Appendix attached to this Brief.

claimants cannot provide proof of insurance.[5] Some companies, recognizing their legal and moral responsibilities, have now provided this information.[6] Petitioners have not.

Instead, petitioners have attacked a California statute, the Holocaust Victim Insurance Relief Act ("HVIRA"), California Insurance Code §§ 13800-13807, which seeks some of the information that has been withheld. Relying on a rarely invoked and clearly inapplicable "foreign affairs" doctrine, petitioners have attempted to manufacture a foreign policy "crisis" that simply does not exist. They have also mischaracterized the HVIRA by asserting – contrary to the detailed findings of the Court of Appeals – that it requires the payment of claims and regulates both foreign companies and the substance of foreign transactions. It does nothing of the sort. Rather, the HVIRA "'is a California insurance regulation of California insurance companies' that 'requires California companies only to *provide information* about Holocaust-era insurance policies that they (or any of their affiliates) issued.'" App. at 9a (emphasis in original).

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[5] The head of the International Commission on Holocaust Era Insurance Claims ("ICHEIC"), former Secretary of State Lawrence Eagleburger, has publicly accused one of the ICHEIC members, Allianz, of failing to pay *any* of thousands of claims submitted to ICHEIC. ER 1958. In response, Allianz pointed out that 92% of the claims did not name any insurance company because survivors did not recall where their families had held the policies. ER 1958.

To the extent that petitioners suggest that needed insurance policy information is being provided through ICHEIC or a settlement with a German insurance foundation, that suggestion is, unfortunately, just wrong. Resp. App. at 25-27, 32-33; ER 544-552. For example, it appears that Allianz will *not* be required under the German Foundation Agreement to produce information about the more than one million policies it wrote. Resp. App. at 26. ICHEIC is a voluntary, private organization that includes only some European insurance companies. ER 544. A number of petitioners' affiliates here (*e.g.*, Gerling and members of the AIA such as Royal SunAlliance and CGU) have declined to join that organization. ER 544, 556.

[6] *See* Resp. App. at 35-41.

Applying this Court's well-known and long-standing precedent, the Court of Appeals has twice rejected the same arguments petitioners now advance in this Court. On both occasions, petitions for rehearing *en banc* were denied, with no judge requesting a vote on the petitions. App. at 3a-4a and Resp. App. at 42-43. Elderly Holocaust survivors and the State of California have already waited too long to obtain needed insurance information. Continued delay should not be permitted.

Before detailing the reasons why the petitions should be denied, the Commissioner will describe the statute at issue here and will address some of the more egregious misstatements in the petitions. *See* Supreme Court Rule 15.2.

A. The HVIRA And Its Purposes

The California legislature, based on uncontradicted findings of decades-long frustration of Holocaust survivors, unanimously passed the HVIRA. A reporting statute, the HVIRA seeks insurance policy information that will assist survivors in deciding whether and against whom they may have an insurance claim. Survivors may then decide whether they wish to pursue that claim, and if so, in what manner (*e.g.*, informally with the insurer, or through the ICHEIC, or through litigation).

The HVIRA imposes the obligation to obtain this policy information on insurers doing business in California if the insurer or a related company sold insurance policies in Europe during the Holocaust. The legislature expressly recognized the persistent and present refusal by insurance companies to disclose needed information, and it determined that insurers doing business in California should take responsibility to obtain that information to avoid further victimization of survivors and their families. Cal. Ins. Code § 13801(a)-(e). Implicit in that determination is the legislature's conclusion that insurers who fail to comply are unfit to continue doing business in California. As the Court of Appeals concluded, the HVIRA reflects a number of state regulatory interests, including protecting California residents from insurance companies that refuse to provide

critical information and/or refuse to pay valid insurance claims, and informing California residents about the character of the family of companies from which they might purchase insurance. App. at 16a, 22a, 23a, 25a. The Court of Appeals found that the HVIRA is rationally related to these legitimate government interests. App. at 22a-27a.

The HVIRA's approach – obtaining information from licensees about affiliate transactions elsewhere – is not materially different from long-standing statutes in every state that require insurance companies, banks and other regulated entities to provide disclosures about their own foreign transactions and those of their affiliates. All of the petitioners except Generali are members of insurance holding company systems[7] – multinational conglomerates whose members are linked together through various control relationships. ER 552-553. California, and virtually every other state,[8] understands and expects that membership in such holding company systems carries with it the obligation by licensees to report on the conduct of other members of that system. *See, e.g.*, Cal. Ins. Code §§ 1215-1215.16. Such membership may require cooperation by affiliates in reporting on foreign transactions. *See, e.g.*, Cal. Ins. Code § 1215.4(g).

Given that insurance and other industries are dominated by worldwide holding company systems, states must have the ability to obtain information about foreign transactions and foreign affiliates if they are effectively to carry out their regulatory function. App. at 25a-27a. Indeed, European insurance regulations also require the denial of a license where a prospective or actual licensee claims that foreign law prevents its disclosure of relevant information.

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[7] Generali is an Italian company that does business in California directly, and that issued Holocaust-era insurance itself. The HVIRA, of course, requires licensees such as Generali to report their own foreign transactions.

[8] *See Alleghany Corp. v. McCartney*, 896 F.2d 1138, 1140 (8th Cir. 1990).

European Parliament and Council Directive 95/26/EC, 1995 O.J. (L 168) 7. So too, if a company improperly fails to comply with the HVIRA's reporting requirement, the Commissioner must "suspend the certificate of authority to conduct insurance business in the state." Cal. Ins. Code § 13806.

B. Petitioners Mischaracterize The HVIRA

Petitioners repeatedly mischaracterize the HVIRA, claiming that it "regulates" the substance of foreign insurance transactions, that it "regulates" foreign insurers, that it "encourages and facilitates drawn-out litigation" and that its "subject matter" is the "payment of claims." Gerling Petition at 2, 14, 19, 20 and "Question Presented" No. 1; AIA Petition at 15, 17 and "Question Presented" No. 2. The Court of Appeals has twice ruled, however, that such contentions "mischaracterize HVIRA as a matter of law." App. at 9a, 43a. Instead, the HVIRA is simply a reporting statute that "seeks only to obtain information about conduct in another jurisdiction without affecting directly any of the conduct." *Id.* As the Court of Appeals concluded:

> HVIRA's reporting provisions do not seek to regulate the substance of out-of-state transactions. The statute does not require insurers to pay any claims or otherwise alter the terms of Holocaust-era insurance policies. To the contrary, HVIRA requires California insurers *only to disclose information about* their foreign transactions or those of their affiliates. A request for information is simply not equivalent to a direct regulation of out-of-state transactions.

App. at 15a-16a (emphasis in original). *See also* App. at 43a.

Petitioners similarly attempt to characterize the HVIRA as an "extraterritorial" regulation. AIA Petition at 24-26, 28. The Court of Appeals also rejected that argument:

> HVIRA's reporting requirements might force a "related" company of a California business to search for information, but that is the extent of HVIRA's

> "extraterritorial" reach. HVIRA, on its face, does not regulate foreign insurance policies, or control the substantive conduct of a foreign insurer, or otherwise affect "the business of insurance" in any other country. . . .

App. at 44a.

Petitioners support their mischaracterizations by complaining that the HVIRA makes them pay twice for Holocaust-era claims. AIA Petition at 4, 13.[9] But the HVIRA does not compel any such thing. It does not demand, require or force the payment of any claims, and it makes no judgment as to whether policies have been properly paid. Nor does it encourage private litigation in California or elsewhere. Quite the contrary, as ICHEIC Chairman Eagleburger and others have recognized, the disclosure of insurance policy information is essential to *any* resolution of Holocaust-era insurance claims, including resolution through ICHEIC. ER 1955.

Petitioners also improperly resort to extensive citation and discussion of another California statute, Code of Civil Procedure Section 354.5, that was enacted a year earlier than the HVIRA. AIA Petition at 7, 8, 23, 115a-122a; Gerling Petition at 1, 3, 4, 5, 14, 20. Section 354.5 provides a California venue for claims made against insurers doing business in the state or whose contacts would already subject them to jurisdiction here, and it extends the statute of limitations on those claims to 2010. The statute does *not* confer personal jurisdiction over foreign affiliates and does *not* impose liability on the local licensee under policies issued by a foreign affiliate.

Petitioners present this separate and distinct statute as though it were part of the HVIRA. But both the District Court and the Court of Appeals rejected identical attempts to conflate the HVIRA with the other statute. App. at 6a,

[9] Holocaust survivors would be grateful if these companies paid just once.

7a, 10a, 16a, 17a, 38a 43a, 86a, 87a. The District Court dismissed all petitioners' challenges to Code of Civil Procedure Section 354.5 for lack of standing, petitioners never appealed that ruling, and both the District Court and Court of Appeals expressly declined petitioners' invitation to link that statute with the HVIRA. *Id.* The District Court, noting that petitioners were referring to both statutes as the "HVIRA," pointed out that Code of Civil Procedure Section 354.5 had been enacted *before* the HVIRA and was "*not* part of the HVIRA." App. at 86a, n.1 (emphasis added). Indeed, petitioner Generali itself has argued in unrelated litigation concerning payment of Holocaust-era insurance claims that the HVIRA "is a separate enactment from [Code of Civil Procedure Section 354.5]" that "[does] not apply California law to foreign insurance contracts, but merely [seeks] information about such policies." Resp. App. at 71.

In short, the HVIRA does not regulate either foreign transactions or foreign companies. Instead, as the Court of Appeals found: "HVIRA is a California insurance regulation of California insurance companies that affects foreign commerce only indirectly." *Id.* at 45a.

C. Petitioners Attempt To Manufacture A Foreign Policy "Crisis" When None Exists

No international Holocaust initiative has been prevented or delayed by the HVIRA. None of the petitioners other than Generali is a European company (Generali is an Italian company licensed to do business in California). Many of petitioners' affiliates are not German companies. Many are not members of ICHEIC.[10] However, relying primarily on earlier suggestions from the Executive Branch and Germany that the HVIRA might "complicate" a then-unfinished agreement with German companies or might undermine ICHEIC, petitioners seek to create the spectre of a foreign policy "crisis," when in fact none exists. AIA

[10] The United States did not create ICHEIC, and the Government's role in ICHEIC is only as an observer. ER 544.

Petition at 2-9, 12-14; Gerling Petition at 5-9. Quite the contrary, the German Foundation Agreement has been consummated and funded, and ICHEIC continues to function as it always has, unaffected by the HVIRA.

In 1999, Germany and several German companies announced their intent to establish a foundation primarily to compensate forced laborers and others who suffered at the hands of German companies during the Nazi era. App. at 51a, 129a. Soon thereafter, the Foundation "Remembrance, Responsibility and the Future" was established. The Foundation is to pay claims that have been or may be asserted against German companies arising from the Nazi era, and is to be funded by German companies and the German government. App. at 51a, 129a, 153a-168a.

In July 2000, Germany and the United States entered into an Executive Agreement regarding the Foundation. App. at 51a, 129a, 153a-168a. That agreement is not a treaty, is not even a "government-to-government claims settlement agreement," and does not preempt the HVIRA. Resp. App. at 45, 48-49. Instead, that agreement simply recognizes that German companies desire "legal peace," and the United States agreed that in any case filed in a court in this country *against* a German company arising from the Holocaust-era, the United States will "inform its courts . . . that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving such claims." App. at 156a.

But the United States has already advised the Court of Appeals in this case that, contrary to petitioners' assertions, the government "has not . . . undertaken a 'duty . . . to achieve' legal peace for German companies against state litigation and regulatory action." Resp. App. at 47-48.[11] The

[11] The agreement recognizes that the United States' interests concerning the Foundation do not "in themselves provide an independent basis for dismissal," of lawsuits against German companies. Resp. App. at 45-46. The United States has since acknowledged that the agreement does not have any preemptive effect. Resp. App. at 48-49.

United States has similarly explained that the agreement's contemplation of "legal peace" relates to "claims *against* German companies that arise out of the Nazi era," that the HVIRA does not contravene specific provisions of the Executive Agreement, and that this case (which does not involve claims against *any* insurance company) "is not one that implicates the German obligation to make payments from the Foundation." Resp. App. at 51-52 n.7 (emphasis in original).

Nor has the HVIRA precluded the consummation or implementation of the Executive Agreement. As the United States also informed the Court of Appeals in this case:

> [Petitioners] are wrong to represent that the panel's decision has placed 'major international agreements . . . in jeopardy' and that Holocaust survivors 'will get no relief from the German Foundation so long as the panel's decision remains in effect.' Under German law, the contribution of German companies to the Foundation, and payments to victims, depend upon a determination by the German Parliament that 'adequate legal security' exists.

Resp. App. at 51 n.7. On May 30, 2001 (after the Court of Appeals' first decision in this case), the German Bundestag determined that adequate "legal peace" exists, and authorized the Foundation to make funds available for the payment of claims. Resp. App. at 53-54. On October 16, 2002 (after the Court of Appeals' second decision in this case), German insurance companies, which continue to refuse to be bound by ICHEIC's claims procedures, reached agreement with ICHEIC to coordinate their claims handling and other procedures with that organization. *See* "Lodging", submitted in support of the Gerling Petition, at L-70 to L-180.

There is simply no evidence that the HVIRA impairs the effective exercise of the Nation's foreign policy. App. at 45a-53a. Quite the opposite, the Court of Appeals concluded that through the U.S. Holocaust Assets Commission Act of 1998 (Resp. App. at 4-16), "Congress has spoken

affirmatively in the area of Holocaust-era insurance policies and has acquiesced in state laws like HVIRA." App. at 47a. Among other things, that Act directs a commission to study and develop a record of Holocaust-era insurance policies, and instructs the commission to enlist the aid of, and coordinate with, state insurance regulators in that endeavor. App. at 47a-50a. Based on the "text, context, and history" of the Act, the Court of Appeals determined that "Congress was aware of the states' involvement in this area and, at least implicitly, encouraged laws like HVIRA." App. at 50a.

D. European Data Protection Laws

Petitioners contend that disclosure of the information sought by the HVIRA would violate certain European data protection laws and subject foreign companies to civil and criminal penalties. AIA Petition at 11, 29; Gerling Petition at 2, 10, 11, 19. As discussed below, the fact that disclosure might violate foreign law does not make the HVIRA unconstitutional.

But even if foreign law were a relevant consideration, petitioners have grossly overstated its application here. The German data protection law is the only law on which petitioners seriously rely. Most of the petitioners, however, are not German companies. One of the petitioners, Generali, is an Italian company, and it makes no claim that Italian law precludes disclosure. Whether compliance with the HVIRA would violate German law is hotly disputed (ER 1708-1768, 1914-1929), and there is no evidence in the record that any foreign government has taken or would take steps to prosecute petitioners or their affiliates if they provided the information the HVIRA requires.

SUMMARY OF ARGUMENT

This case does not warrant review, and the petition should be denied. Petitioners grossly overstate the case's potential impact on foreign affairs, and do not show a conflict with any decision of this Court or any federal court of appeals.

A. Foreign Affairs

The HVIRA does not interfere with U.S. foreign policy. The only alleged "threat" to U.S. foreign policy suggested by petitioners is that the HVIRA poses some vague obstacle to the German Foundation Agreement and ICHEIC. As detailed in this Brief, the facts belie petitioners' argument. The German Foundation and ICHEIC remain unaffected by the HVIRA, and petitioners present no evidence of *any* tangible effects upon or threats to foreign affairs.

Nor do the decisions below conflict with *Zschernig v. Miller*, 389 U.S. 429 (1968) or *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), as petitioners contend. Both *Zschernig* and *Natsios* involved state statutes that singled out foreign governments for hostility and criticism, and in neither case had Congress indicated any approval of the state laws. In contrast, the HVIRA is merely a regulation of private business, and does not criticize, or even affect, foreign governments. Thus, this case is totally distinct from *Zschernig* and *Natsios*, and instead resembles *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298 (1994), and *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903 (3rd Cir. 1990) (two cases petitioners do not even cite). *Barclays* and *Trojan* upheld state regulations affecting foreign private companies that, while protested by foreign governments, did not criticize or otherwise directly affect those governments.

B. Legislative Jurisdiction

The Commissioner summarizes and fully discusses the reasons why the HVIRA does not exceed California's legislative jurisdiction under the Due Process Clause in his Brief in Opposition to the Gerling Petition (No. 02-733) (pages 14-15, 18-26).

C. Commerce Clause

The HVIRA does not violate the dormant Commerce Clause. The HVIRA regulates the business of insurance. Through the McCarran-Ferguson Act, Congress delegated

its authority to regulate the business of insurance to the states and insulated the exercise of that authority from any Commerce Clause challenge. 15 U.S.C. § 1011 (2000); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 431 (1946) (holding that the Act shields state insurance regulation "from any attack under the Commerce Clause"). Since the enactment of McCarran-Ferguson, this Court has repeatedly held that the Act insulates state insurance regulations from all Commerce Clause challenges. *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648 (1981).

Petitioners rely on a supposed "extraterritorial" Commerce Clause exception to McCarran-Ferguson that has never been recognized by any court. The only case petitioners cite for such an exception, *Federal Trade Comm'n v. Travelers Health Ass'n*, 362 U.S. 293 (1960), does not even address the Commerce Clause. Instead, that case dealt with the relationship between the McCarran-Ferguson Act and the Federal Trade Commission Act. The FTC Act is not at issue here. Nor does the language of the McCarran-Ferguson Act support any extraterritorial exception. This Court has already held that the language of the McCarran-Ferguson Act must be read broadly in some instances and narrowly in others in order for the Act to achieve its primary legislative purpose, which is to insulate state insurance regulation from any Commerce Clause challenge. *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979). No court has ever read *Travelers* to be relevant to dormant Commerce Clause claims.

Finally, the HVIRA does not have extraterritorial application. It applies only to companies doing business in California and does not burden or discriminate against commerce. Nor does the HVIRA interfere with the United States' ability to "speak with one voice" in matters of foreign commerce. *See, e.g., Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994).

REASONS TO DENY THE PETITION

I. THE COURT OF APPEALS' DECISIONS HAVE NOT HAD, AND ARE NOT LIKELY TO HAVE, ADVERSE EFFECTS ON U.S. FOREIGN POLICY

Petitioners attempt to manufacture a foreign policy crisis.[12] According to them, "it is difficult to overstate the conflict" between the HVIRA and U.S. foreign policy goals. AIA Petition at 13. But there is no conflict, and, as the Court of Appeals found, there is no basis for believing that enforcement of the HVIRA will have material adverse foreign policy effects. App. at 53a-59a. Petitioners reach their overblown conclusions only by mischaracterizing the HVIRA.

Petitioners describe the HVIRA as forcing payment of European claims in California courts, and thus conflicting with U.S. efforts to settle Holocaust-era claims internationally. But as the Court of Appeals observed, the HVIRA is only a reporting statute that requires nothing more than disclosure of information about Holocaust-era policies. App. at 9a, 15a-16a. Nothing in the HVIRA requires any payment of any claim in any forum. It does not conflict with the international settlement of claims.

Petitioners further imply that because the HVIRA may indirectly impose some burdens on private foreign insurers, it may interfere with negotiations concerning the international settlement of Holocaust-era claims. But there is no evidence of any such interference. The German Foundation Agreement has been consummated, and ICHEIC is proceeding. Petitioners' unsupported assertion that the HVIRA will

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[12] The AIA Petitioners and Gerling both claim, in essentially identical terms, that the HVIRA interferes with U.S. foreign policy and is unconstitutional under the dormant foreign affairs power. The Commissioner's arguments in Sections I and II of this Brief are equally responsive to the foreign affairs claims raised in the Gerling Petition (No. 02-733).

interfere with either process is in fact belied by recent events.

With respect to the German Foundation, the United States, while opposing the HVIRA on other grounds, has said that the HVIRA does not jeopardize the German Foundation Agreement and specifically that the HVIRA does not "contravene specific provisions of the [Agreement]." Resp. App. at 51-52 n.7. The United States has also disavowed a number of petitioners' arguments: "[Petitioners] are wrong to represent that the [court of appeals] decision has placed 'major international agreements . . . in jeopardy.'" *Id.* "[Petitioners] also err in asserting that the German Foundation Agreement and other international agreements contain a promise of comprehensive 'legal peace' – in particular, protection of European companies from litigation and from other state and local action, including the HVIRA." *Id.*

The German Foundation Agreement is being fully effectuated despite the Court of Appeals' decisions upholding the HVIRA. In particular, Germany has acknowledged the existence of "satisfactory legal peace for German companies" as contemplated in the Agreement, and since the Court of Appeals' initial decision in this case, the funding contemplated by the Agreement has been made. Gerling Petition at 8.

With respect to ICHEIC, the voluntary efforts to settle Holocaust-era insurance claims are also proceeding without effect from the HVIRA. ICHEIC recently signed an agreement with the German Foundation, establishing a settlement process for claims against German insurers. *See* "Lodging", submitted in support of the Gerling Petition, at L-70 to L-180. Notably, this too occurred after the Court of Appeals' second decision in this case, finally rejecting all of petitioners' claims. Indeed, as the Court of Appeals noted, there is nothing inconsistent between ICHEIC and the HVIRA, both of which seek disclosure of information relating to Holocaust-era insurance policies. App. at 53a. There is simply no evidence that the reporting requirements the HVIRA imposes on California-licensed companies

have had or will have any material effect on the Foundation, ICHEIC or any other international negotiations.

II. THE COURT OF APPEALS' DECISIONS UPHOLDING THE HVIRA AGAINST A FOREIGN AFFAIRS CHALLENGE DO NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER FEDERAL COURT

A. The Court Of Appeals' Decisions Are Consistent With This Court's Decision In *Zschernig v. Miller*

Petitioners claim that the decisions below are in "direct conflict" with and "tantamount to a refusal to follow" this Court's decision in *Zschernig v. Miller*, 389 U.S. 429 (1968). AIA Petition at 14, 18. On the contrary, the Court of Appeals carefully considered that decision and subsequent decisions applying it, and correctly concluded, in light of the facts, that *Zschernig* and related cases do not invalidate the HVIRA. App. at 55a-59a.

In *Zschernig*, this Court invalidated an Oregon inheritance law that, as applied, led to sharp criticism of Communist governments by Oregon state courts. This Court found that "in this reciprocity area under inheritance statutes, the probate courts of various States have launched inquiries into the type of governments that obtain in particular foreign nations, [leading to] judicial criticism of nations established on a more authoritarian basis than our own." *Zschernig*, 389 U.S. at 433-434, 440. The court below, after examining *Zschernig* and evaluating the facts of this case, found that the diplomatic concerns present in *Zschernig* were not present here, for at least three reasons.

First, unlike the statute in *Zschernig*, the HVIRA does not insult, criticize or exhibit hostility toward any foreign government. App. 55a-59a. As the Court of Appeals observed, "in *Zschernig*, the Oregon probate statute violated the foreign affairs power because, as applied, it allowed Oregon judges to insult foreign nations." *Id.* (citing *Zschernig*, 389 U.S. at 433-435). In contrast, the HVIRA does not criticize, or even address, any foreign government. It is

directed only to private in-state companies, and only requires them to provide information as a condition of doing business in California. The Court of Appeals thus found that "there is no evidence that HVIRA would be applied in a way that would implicate the diplomatic concerns mentioned in *Zschernig*" – *i.e.*, the danger of states insulting foreign governments. *Id.*

Second, the HVIRA does not target any country or group of countries. Instead, it merely regulates all insurers, regardless of nationality, doing business in California. While some foreign governments may object to the way California has chosen to regulate its insurance market, that also does not raise the sort of diplomatic concerns evident in *Zschernig*, which was not concerned with incidental and indirect effects on foreign governments. *Id.*[13]

Third, Congress has implicitly approved state legislation like the HVIRA. The Court of Appeals found that, by passing the U.S. Holocaust Assets Commission Act of 1998, "Congress has spoken affirmatively in the area of Holocaust-era insurance policies and has acquiesced in state laws like HVIRA." App. at 47a. That statute and its legislative history show that "Congress was aware of the states' efforts to obtain information on Holocaust-era insurance policies" and "encouraged laws like HVIRA." *Id.* at 49a, 50a. Among other things, Congress directed the federal Holocaust Commission to "encourage [state regulators] to prepare a report on the Holocaust-related claims practices of all insurance companies, both domestic and foreign." *Id.* No comparable action of Congress had occurred in *Zschernig*. Petitioners simply ignore this congressional activity in discussing *Zschernig*. AIA Petition at 16-18.

[13] Petitioners claim that "the HVIRA on its face is directed toward specific European countries and reflects a judgment that the judicial process and regulatory authority of those countries – notably Germany – cannot be trusted." AIA Petition at 17. Nothing in the record or on the face of the statute supports this characterization.

B. The Court Of Appeals' Decisions Are Consistent With Subsequent Decisions That Apply *Zschernig*

The Court of Appeals' decisions are consistent with two important decisions applying *Zschernig*, neither of which petitioners mention. In *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994), and *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903 (3d Cir. 1990), this Court and the Court of Appeals for the Third Circuit upheld state statutes against *Zschernig* challenges in circumstances similar to this case. In both cases, the challenged regulations had substantial effects on foreign businesses, had been the subject of strong diplomatic complaints by foreign governments, and were the subject of international negotiations. However, in neither case was the *Zschernig* challenge sustained.[14]

In *Barclays*, this Court considered a state tax that was highly disadvantageous to foreign companies and had been vigorously protested by numerous foreign governments, including many of the main trading partners of the United States. *Barclays*, 512 U.S. at 324-326 & n.22. Although the law had obvious effects on foreign affairs, this Court upheld it, relying largely on the implicit approval of Congress. The U.S. Executive Branch, under pressure from foreign governments, had asked Congress to override the state statute, but Congress declined. For this reason, this Court said, it was not the Court's role to override what Congress had decided to permit. *Id.* at 324-331. The present case is an even stronger one for upholding the state law, for here

[14] Although the grant of certiorari in *Barclays* included the *Zschernig* challenge, this Court decided the case under the dormant Commerce Clause and upheld the statute without mentioning *Zschernig*, thus implicitly rejecting the *Zschernig* challenge. In *Trojan Technologies*, the Third Circuit specifically considered and rejected the *Zschernig* challenge.

Congress not only has declined to override statutes such as the HVIRA, but has implicitly encouraged them.[15]

The Third Circuit's decision in *Trojan* also informed the decisions below. In *Trojan*, Pennsylvania had directed its agencies to buy only American products. Foreign governments protested. Moreover, international negotiations at the time were seeking a comprehensive agreement on lowering barriers to international competition in procurement, a result the U.S. supported. *Trojan*, 916 F.2d at 906-908. Nonetheless, the Third Circuit upheld the state law. In addition to noting implicit congressional acquiescence, the court emphasized that the state law did not single out any country or group of countries for insult or criticism. *Id.* at 913-914. In the decisions below, the Court of Appeals relied on the Third Circuit's application of *Zschernig*, upholding the HVIRA because it also does not single out any country or group of countries for insult or criticism. App. at 57a-58a (citing *Trojan*).

C. The Decisions Below Do Not Conflict With Any Decision Of Any Other Court Of Appeals

Petitioners claim that the decisions below conflict with the First Circuit's decision in *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd sub nom. on other grounds, Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). AIA Petition at 14-19; Gerling Petition at 24-28. Petitioners are again mistaken.

In *Natsios*, the First Circuit invalidated a Massachusetts statute that penalized companies for doing business in Burma. It did so on multiple grounds, including federal statutory preemption and under *Zschernig*.[16] The state

[15] Further, like the present case and unlike *Zschernig*, *Barclays* involved a commercial regulation directed at private companies rather than foreign governments, without any suggestion of criticism or hostility toward any foreign government.

[16] In *Crosby*, this Court affirmed the statutory preemption holding and did not reach the *Zschernig* issue. *Crosby*, 530 U.S. at 373 n.8.

statute, enacted in direct response to the repressive policies of the Burmese military regime, consciously sought to coerce the Burmese government into holding democratic elections. *Natsios*, 181 F.3d at 47. As a result, the statute came within *Zschernig*'s prohibition of state statutes that show hostility toward foreign governments. *See Natsios*, 181 F.3d at 56 (distinguishing *Trojan Technologies* on the ground that the law involved there "did not single out or evaluate any particular foreign state and did not involve state evaluations of political conditions abroad," whereas "[i]n contrast, the Massachusetts Burma law is aimed at a specific foreign state").

Unlike the statute in *Natsios*, the HVIRA does not criticize any foreign government. Further, in *Natsios*, Congress had passed conflicting federal legislation. In this case, the Court of Appeals specifically found that Congress had approved state involvement in Holocaust-era insurance issues. App. at 47a-50a.

In short, the three Circuits that have applied *Zschernig* – the First Circuit in *Natsios*, the Third Circuit in *Trojan*, and the Ninth Circuit below – are in perfect accord. Where a state law singles out a foreign country or group of countries for criticism, and the law is not approved by Congress, it may be questioned under *Zschernig* because it is not the role of states to pass judgment upon foreign governments. But where a state law regulates private businesses in a manner that has some international effects but is not directed at foreign governments, and particularly where Congress has encouraged state involvement, *Zschernig* does not apply.

III. THE COURT OF APPEALS DECISION UPHOLDING THE HVIRA AGAINST A DUE PROCESS/LEGISLATIVE JURISDICTION CHALLENGE DOES NOT WARRANT FURTHER REVIEW BY THIS COURT

The AIA Petitioners and Gerling both argue, in essentially the same terms, that the HVIRA exceeds California's legislative jurisdiction under the Due Process Clause, and that the decision by the Court of Appeals below conflicts

with a decision by the Court of Appeals for the Eleventh Circuit concerning Florida's Holocaust insurance statute. The Commissioner fully addresses these arguments at pages 18-26 of his Brief in Opposition to the Gerling Petition (No. 02-733), and respectfully requests the Court to refer to that Brief for discussion of these issues.

IV. THE COURT OF APPEALS' DECISION UPHOLDING THE HVIRA AGAINST A COMMERCE CLAUSE CHALLENGE IS CONSISTENT WITH THIS COURT'S INTERPRETATION OF THE MCCARRAN-FERGUSON ACT

The AIA Petitioners claim that the Court of Appeals "went fatally astray" from "a controlling decision of this Court" in holding that the McCarran-Ferguson Act, 15 U.S.C. § 1011-1015, protects the HVIRA from challenge under the Commerce Clause. AIA Petition at 24. This mischaracterizes the decision below. The Court of Appeals followed over fifty years of precedent holding that the McCarran-Ferguson Act insulates state insurance regulations from *all* Commerce Clause restrictions, even if the regulations affect extraterritorial conduct. Indeed, since the passage of the McCarran-Ferguson Act, neither this Court nor any other court has invalidated a state insurance regulation under the Commerce Clause based on its extraterritorial effects.

A. The Court Of Appeals' Decision Is Consistent With The Plain Language Of The Mccarran-Ferguson Act And More Than Fifty Years Of Precedent Holding That The Act Exempts State Insurance Regulations From All Commerce Clause Restrictions

The first section of the McCarran-Ferguson Act provides:

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose *any barrier* to the regulation or taxation of such business by the several States.

15 U.S.C. § 1011 (2000) (emphasis added). Consistent with this declaration of legislative purpose, Section 1012(a) provides: "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

Consistent with the Act's plain language, for more than half a century, this Court has held that the McCarran-Ferguson Act insulates state insurance regulations from all Commerce Clause attack. This Court first considered the issue in *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946), which concerned a state tax imposed solely on foreign insurance companies doing business in the state. In rejecting a Commerce Clause challenge, this Court assumed that the tax affected interstate commerce and was discriminatory. *Id.* at 429. Nonetheless, this Court held that, by enacting the McCarran-Ferguson Act, Congress had "clearly put the full weight of its power behind existing and future state legislation to sustain it *from any attack under the commerce clause* to whatever extent this may be done with the force of that power behind it." *Id.* at 431 (emphasis added).

The AIA Petitioners attempt to create an "extraterritoriality" exception to the plain language of the Act and this Court's precedent, arguing that the Act does not protect state insurance regulations that are extraterritorial. AIA Petition at 25. But, as the Court of Appeals observed, this purported exception has no basis in this Court's precedent. Instead, following *Benjamin*, this Court has repeatedly held that the McCarran-Ferguson Act exempts state insurance regulations from *all* Commerce Clause restrictions, even where the regulation has extraterritorial effects.[17] In

[17] In *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451 (1962), for example, this Court rejected a Commerce Clause challenge to a Texas statute taxing corporations on premiums paid to foreign insurers.

(Continued on following page)

Western & Southern Life Insurance Co. v. State Board of Equalization, 451 U.S. 648, 669-671 (1981), for example, California imposed a retaliatory tax on foreign insurers to pressure other states to lower taxes on California insurers. Although the statute was both discriminatory and extraterritorial, this Court upheld it against a Commerce Clause challenge.[15]

In sum, the court below followed the plain language of the Act and the clear direction of this Court's precedents. The Commerce Clause presents no barriers to a state's regulation of insurance, even if such regulation affects commerce outside that state, and no court has ever held otherwise.

B. The Court Of Appeals' Decision Is Consistent With This Court's Decision In *Travelers*

In asserting an "extraterritorial" exception to the McCarran-Ferguson Act, the AIA Petitioners rely primarily on *Federal Trade Comm'n v. Travelers Health Ass'n*, 362 U.S. 293 (1960), which they say reached "precisely that

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This Court noted that: (1) the insurer in question was not licensed in Texas, had no agents there, and did not solicit business or investigate claims there; (2) the insured corporation was not licensed in Texas; (3) the insurance was bought and issued outside Texas; and (4) losses under the policies were not paid to Texas residents. *Id.* at 454-455. Yet, this Court found no Commerce Clause violation even though Texas sought to regulate conduct that "take[s] place entirely outside Texas." *Id.* at 454. Despite the statute's extraterritorial effect, this Court stated that Congress had passed the McCarran-Ferguson Act to provide that "the regulation and taxation of insurance should be left to the States, without restriction by reason of the Commerce Clause." *Id.* at 452. The Court did, however, hold that the statute violated the Due Process Clause. *Todd Shipyards*, 370 U.S. at 457. As the Commissioner discusses in his Brief in Opposition to the Gerling Petition (pages 18-29), the HVIRA does not violate due process either.

[15] *Cf. Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 219 n.18 (1979).

conclusion." AIA Petition at 25. Petitioners wholly mischaracterize *Travelers*. As the Court of Appeals held, *Travelers* did not even involve a Commerce Clause challenge, and instead addressed a totally distinct part of the McCarran-Ferguson Act. App. at 41a-42a.

In addition to exempting state insurance regulations from Commerce Clause attack, the Act also gives state insurance regulations a more limited exemption from federal statutory preemption. Section 1012(b) provides in part: "No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." Section 1012(b) also provides that the federal antitrust statutes and the Federal Trade Commission Act do apply to the "business of insurance," but only "to the extent that such business is not regulated by state law."

Travelers involved only an interpretation of McCarran-Ferguson's narrow exemption for the Federal Trade Commission Act. It considered whether the FTC could regulate interstate insurance sales under Section 1012(b) of the Act. The FTC sought to enjoin deceptive advertising by a Nebraska company that sold insurance nationwide. To evade federal regulation, the insurer argued that the FTC could not regulate its business because a Nebraska statute already prohibited Nebraska insurance companies from engaging in deceptive trade practice "in any other state." *Travelers*, 362 U.S. at 296.

This Court disagreed, holding that the McCarran-Ferguson Act permitted the FTC to act. This Court reasoned that Congress did not intend to allow a single state's law to displace the FTC's ability to protect residents of other states. *Id.* at 297-298. Otherwise, the purpose of Section 1012(b) would be subverted: If one state had a fair trade statute that purported to regulate nationwide, an insurer located there would be free from the reach of the FTC Act in every other state. *Id.* at 302. To avoid this result, this Court determined that the "state regulation" that could displace the FTC Act under Section 1012(b)

meant "regulation by the state in which the deception is practiced and has its impact," *id.* at 298, or "where the business activities have their operative force." *Id.* at 301-02. However, this has nothing to do with Congress' direction that state insurance regulation be insulated "from *any* attack under the commerce clause." *Benjamin*, 328 U.S. at 421 (emphasis added).

Petitioners' argument that *Travelers'* "extraterritoriality exception" to Section 1012(b)'s preemption exemption should also apply to the state's Commerce Clause immunity under Section 1012(a) is based mainly on similarity in the language of the two provisions. AIA Petition at 27. But the argument ignores and is flatly inconsistent with other language in the Act, namely, its Declaration of Policy in Section 1011, which provides that "silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation" of the business of insurance.

According to the AIA Petitioners, the HVIRA's claimed extraterritoriality not only excepts it from the McCarran-Ferguson Act's protection against Commerce Clause attack, but is also a reason that the HVIRA violates the Commerce Clause. Since no one doubts that, for Commerce Clause purposes, Congress could consent to state HVIRA-type disclosure requirements, Petitioners' Commerce Clause claim is obviously predicated on the absence of such express consent – that is, on Congressional silence. For this argument to prevail, Section 1011 of the McCarran-Ferguson Act must be read to permit an extraterritoriality exception that not only is not in the text, but also is belied by Section 1011's clear preclusion of Congressional silence as the basis of "any" barrier to State regulation. The *Travelers* Court's interpretation of Section 1012(b)'s preemption exemption did not face this textual obstacle because it did not implicate Section 1011's Declaration of Policy with respect to the Commerce Clause.

Petitioners attempt to buttress their argument by citing legislative history of the McCarran-Ferguson Act, relied on by the *Travelers* majority, showing that Congress did not intend to overturn three pre-McCarran decisions of

this Court, which held that the Due Process Clause limits extraterritorial state insurance taxation and regulation. AIA Petition at 28-29. While the *Travelers* majority thought this history relevant to the preemption exemption of Section 1012(b), the decision did not involve the Commerce Clause, and the Court therefore did not have to confront the question of how to reconcile this history with the plain meaning of Section 1011 of the Act. Justices Harlan, Frankfurter and Whitaker dissented in *Travelers*, believing that this same legislative history was "much too meager to justify" even the Court's interpretation of Section 1012(b) of the Act.

In any event, this Court has acknowledged the textual difference between the Act's broad Commerce Clause immunity and the limited statutory exemption of Section 1012(b):

> The McCarran-Ferguson Act operates to assure that the States are free to regulate insurance companies without fear of Commerce Clause attack. The question in the present case, however, is one under the quite different secondary purpose of the McCarran-Ferguson Act – to give insurance companies only a limited exception from the antitrust laws.

Group Life & Health Ins. v. Royal Drug Co., 440 U.S. 205, 218 n.18.

Finally, as the Court of Appeals implicitly recognized, interpreting Section 1011 to mean what it plainly says does not disregard the legislative history on which petitioners rely, or concede that the states may regulate extraterritorially in all cases. Instead, it quite sensibly reads that history to signal Congress' understanding that the McCarran-Ferguson Act did not purport to eliminate due process limits on state legislative jurisdiction.

Thus, as the Court of Appeals observed, *Travelers* did not address the issue in this case – namely, the scope of the McCarran-Ferguson Act's exemption of state insurance regulations from the Commerce Clause under Sections 1011 and 1012(a). App. at 42a. In contrast to those sections,

which are broad grants of Congressional power to the States to regulate the business of insurance free from Commerce Clause restriction, Section 1012(b) simply establishes narrow exceptions for several specific federal laws. Those exceptions apply only to those specified laws, they have a different purpose, and they are subject to a different analysis than Sections 1011 and 1012(a). *Group Life & Health Ins. v. Royal Drug Co.*, 440 U.S. 205, 218-219 & n.8 (1979). Accordingly, *Travelers* has no bearing on petitioners' Commerce Clause challenge, and provides no reason for this Court's review.

C. The Court of Appeals' Decision Is Consistent With This Court's Commerce Clause Precedent Outside the Insurance Context Because The HVIRA Does Not Regulate Extraterritorially

Even if the AIA Petitioners are correct that the McCarran-Ferguson Act does not shield extraterritorial laws from Commerce Clause attack, the HVIRA would still be constitutional because it is not an extraterritorial law. It applies only to insurers doing business in California, and applies equally to all such insurers, foreign or domestic. As the Court of Appeals held, the HVIRA does not "regulate foreign insurance policies" or "control the substantive conduct of a foreign insurer." App. at 44a. Instead, the "HVIRA requires California companies only to *provide information* about Holocaust-era insurance policies that they (or any of their affiliates) issued." App. at 43a (emphasis in original). Although policy information may be located in the offices of related European insurers, the HVIRA does not direct those companies to do anything. Thus, the Court of Appeals correctly held that the HVIRA was distinguishable from the statute in *Travelers* which "sought to regulate directly the conduct of an insurer in another jurisdiction." App. at 43a.

D. The Court of Appeals' Decision Is Consistent With This Court's Authorities Construing The Foreign Commerce Clause

The AIA Petitioners argue that the HVIRA violates the foreign Commerce Clause because it purportedly disrupts "an area where a uniform national approach is necessary." AIA Petition at 24-25. In rejecting this argument, the Court of Appeals followed this Court's decision in *Barclays*, 512 U.S. 298 (1994), and did not create conflict with the decision of any other court.[19] In *Barclays*, this Court considered whether California's worldwide-reporting tax system impaired the federal government's ability to speak with one voice in international commerce. This Court stated that the controlling test for foreign Commerce Clause purposes was whether there were "specific indications of congressional intent to bar the state action here challenged." *Id.* at 324. Finding no such indications, *Barclays* upheld the state law even though foreign governments and the U.S. Executive Branch had strenuously objected to it. *Id.* at 328-329 & n.30.

This Court specifically rejected the argument that a series of Executive Branch actions, statements and amicus filings constituted a "clear federal directive" proscribing California's statute, *id.* at 328, stating that "[t]he Constitution expressly grants Congress, not the President, the power to regulate Commerce with foreign nations." *Id.* at 329. "Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned, use of worldwide combined reporting." *Id.* at 329-330. Thus, *Barclays* establishes that Congress, and not

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[19] Petitioners claim that "[t]he Ninth Circuit did not deny that the HVIRA violates the Foreign Commerce Clause if it is applicable." AIA Petition at 25. This is simply incorrect. The Ninth Circuit, relying on *Barclays* (which petitioners do not even discuss) held that even if the Foreign Commerce Clause is applicable, the HVIRA does not violate it. App. at 45a-47a.

the Executive Branch, is the "one voice" that matters for purposes of the foreign Commerce Clause. *See also Wardair Canada, Inc. v. Fla. Dept. of Revenue*, 477 U.S. 1 (1986).

Here, petitioners have failed to address *Barclays* or proffer any "specific indications of congressional intent to bar the state action challenged." *Barclays*, 512 U.S. at 324. Nor could they, as Congress has voiced neither a need for national uniformity in insurance regulation nor any intent to bar the HVIRA. On the contrary, through the McCarran-Ferguson Act, Congress left regulation of insurance to the states. Further, as the Court of Appeals found, Congress has passed a statute, the U.S. Holocaust Commission Act of 1998, and made statements supporting the goals of the HVIRA and the significant role of state insurance regulators in addressing Holocaust-era insurance issues. App. at 47a-50a. Accordingly, the HVIRA does not impair Congress' ability to "speak with one voice" in foreign commerce.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX
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APPENDIX A

[The McCarran-Ferguson Act,
15 USCS § 1011-1015 (2001)]

§ 1011. Declaration of policy

The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

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§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation. The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act [*15 USCS §§ 1* et seq.], and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [*15 USCS §§ 41* et

se.], shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

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§ 1013. Suspension until June 30, 1948, of application of certain Federal laws; Sherman Act [15 USCS § 1 et seq.] applicable to agreements to, or acts of, boycott, coercion, or intimidation

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act [*15 USCS §§ 1* et seq.], and the Act of October 15, 1914, as amended, known as the Clayton Act and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [*15 USCS §§ 41* et seq.], and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act [*15 USCS §§ 1011* et seq.] shall render the said Sherman Act [*15 USCS §§ 1* et seq.] inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

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§ 1014. Applicability of National Labor Relations Act [29 USCS §§ 151 et seq.] and the Fair Labor Standards Act of 1938

Nothing contained in this Act [*15 USCS §§ 1011* et seq.] shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act [*29 USCS §§ 151* et seq.], or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938,

or the Act of June 5, 1920, known as the Merchant Marine Act 1920.

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§ 1015. Definition of "State"

As used in this Act [*15 USCS §§ 1011* et se q.], the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, Guam, and the District of Columbia.

APPENDIX B

[The U.S. Holocaust Assets Commission Act of 1998. Act of June 23, 1998, P.L. 105-186, 112 Stat. 611; as amended Dec. 9, 1999, P.L. 106-155, § 2, 113 Stat. 1740.]

Section I. Short title.

This Act may be cited as the "U.S. Holocaust Assets Commission Act of 1998."

Sec. 2. Establishment of Commission.

(a) Establishment. There is established a Presidential Commission, to be known as the "Presidential Advisory Commission on Holocaust Assets in the United States" (hereafter in this Act referred to as the "Commission").

(b) Membership.

(1) Number. The Commission shall be composed of 21 members, appointed in accordance with paragraph (2).

(2) Appointments. Of the 21 members of the Commission –

(A) eight shall be private citizens, appointed by the President;

(B) four shall be representatives of the Department of State, the Department of Justice, the Department of the Army, and the Department of the Treasury (one representative of each such Department), appointed by the President;

(C) two shall be Members of the House of Representatives, appointed by the Speaker of the House of Representatives;

(D) two shall be Members of the House of Representatives, appointed by the minority leader of the House of Representatives;

(E) two shall be Members of the Senate, appointed by the majority leader of the Senate;

(F) two shall be Members of the Senate, appointed by the minority leader of the Senate; and

(G) one shall be the Chairperson of the United States Holocaust Memorial Council.

(3) Criteria for membership. Each private citizen appointed to the Commission shall be an individual who has a record of demonstrated leadership on issues relating to the Holocaust or in the fields of commerce, culture, or education that would assist the Commission in analyzing the disposition of the assets of Holocaust victims.

(4) Advisory panels. The Chairperson of the Commission may, in the discretion of the Chairperson, establish advisory panels to the Commission, including State or local officials, representatives of organizations having an interest in the work of the Commission, or others having expertise that is relevant to the purposes of the Commission.

(5) Date. The appointments of the members of the Commission shall be made not later than 90 days after the date of enactment of this Act.

(c) Chairperson. The Chairperson of the Commission shall be selected by the President from among the members of the Commission appointed under subparagraph (A) or (B) of subsection (b)(2).

(d) Period of appointment. Members of the Commission shall be appointed for the life of the Commission.

(e) Vacancies. Any vacancy in the membership of the Commission shall not affect its powers, but shall be filled in the same manner as the original appointment.

(f) Meetings. The Commission shall meet at the call of the Chairperson at any time after the date of appointment of the Chairperson.

(g) (Quorum. 11 members of the Commission shall constitute a quorum, but a lesser number of members may hold meetings.

Sec. 3 Duties of the Commission.

(a) Original research.

(1) In general. Except as otherwise provided in paragraph (3), the Commission shall conduct a thorough study and develop a historical record of the collection and disposition of the assets described in paragraph (2), if such assets came into the possession or control of the Federal Government, including the Board of Governors of the Federal Reserve System and any Federal reserve bank, at any time after January 30, 1933 –

(A) after having been obtained from victims of the Holocaust by, on behalf of, or under authority of a government referred to in subsection (c);

(B) because such assets were left unclaimed as the result of actions taken by, on behalf of, or under authority of a government referred to in subsection (c); or

(C) in the case of assets consisting of gold bullion, monetary gold, or similar assets, after such assets had been obtained by the Nazi government of Germany from governmental institutions in any area occupied by the military forces of the Nazi government of Germany.

(2) Types of assets. Assets described in this paragraph include –

(A) gold, including gold bullion, monetary gold, or similar assets in the possession of or under the control of the Board of Governors of the Federal Reserve System or any Federal reserve bank;

(B) gems, jewelry, and nongold precious metals;

(C) accounts in banks in the United States;

(D) domestic financial instruments purchased before May 8, 1945, by individual victims of the Holocaust, whether recorded in the name of the victim or in the name of a nominee;

(E) insurance policies and proceeds thereof;

(F) real estate situated in the United States;

(G) works of art; and

(H) books, manuscripts, and religious objects. For full classification, consult USCS Tables volumes.

(3) Coordination of activities. In carrying out its duties under paragraph (1), the Commission shall, to the maximum extent practicable, coordinate its activities with, and not duplicate similar activities already being undertaken by, private individuals, private entities, or government entities, whether domestic or foreign.

(4) Insurance policies.

(A) In general. In carrying out its duties under this Act, the Commission shall take note of the work of the National Association of Insurance Commissioners with regard to Holocaust-era insurance issues and shall encourage the National Association of Insurance Commissioners to prepare a report on the Holocaust-related claims practices of all insurance companies, both domestic and foreign, doing business in the United States at any time after January 30, 1933, that issued any individual life, health, or property-casualty insurance policy to any individual on any list of Holocaust victims, including the following lists:

(i) The list maintained by the United States Holocaust Memorial Museum in Washington, D.C., of Jewish Holocaust survivors.

(ii) The list maintained by the Yad Vashem Holocaust Memorial Authority in its Hall of Names of individuals who died in the Holocaust.

(B) Information to be included. The report on insurance companies prepared pursuant to subparagraph (A) should include the following, to the degree the information is available:

(i) The number of policies issued by each company to individuals described in such subparagraph.

(ii) The value of each policy at the time of issue.

(iii) The total number of policies, and the dollar amount, that have been paid out.

(iv) The total present-day value of assets in the United States of each company.

(C) Coordination. The Commission shall coordinate its work on insurance issues with that of the international Washington Conference on Holocaust-Era Assets, to be convened by the Department of State and the United States Holocaust Memorial Council.

(b) Comprehensive review of other research. Upon receiving permission from any relevant individuals or entities, the Commission shall review comprehensively any research by private individuals, private entities, and non-Federal government entities, whether domestic or foreign, into the collection and disposition of the assets described in subsection (a)(2), to the extent that such research focuses on assets that came into the possession or control of private individuals, private entities, or non-Federal government entities within the United States at any time after January 30, 1933, either –

(1) after having been obtained from victims of the Holocaust by, on behalf of, or under authority of a government referred to in subsection (c); or

(2) because such assets were left unclaimed as the result of actions taken by, on behalf of, or under authority of a government referred to in subsection (c).

(c) Governments included. A government referred to in this subsection includes, as in existence during the period beginning on March 23, 1933, and ending on May 8, 1945 –

(1) the Nazi government of Germany;

(2) any government in any area occupied by the military forces of the Nazi government of Germany;

(3) any government established with the assistance or cooperation of the Nazi government of Germany; and

(4) any government which was an ally of the Nazi government of Germany.

(d) Reports.

(1) Submission to the President. Not later than December 31, 2000, the Commission shall submit a final report to the President that shall contain any recommendations for such legislative, administrative, or other action as it deems necessary or appropriate. The Commission may submit interim reports to the President as it deems appropriate.

(2) Submission to the Congress. After receipt of the final report under paragraph (1), the President shall submit to the Congress any recommendations for legislative, administrative, or other action that the President considers necessary or appropriate.

Sec. 4. Powers of the Commission.

(a) Hearings. The Commission may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission considers advisable to carry out this Act.

(b) Information from Federal agencies. The Commission may secure directly from any Federal department or agency such information as the Commission considers necessary, to carry out this Act. Upon request of the Chairperson of the Commission, the head of any such department or agency shall furnish such information to the Commission as expeditiously as possible.

(c) Postal services. The Commission may use the United States mails in the same manner and under the same conditions as other departments and agencies of the Federal Government.

(d) Gifts. The Commission may accept, use, and dispose of gifts or donations of services or property.

(e) Administrative services. For the purposes of obtaining administrative services necessary to carry out the purposes of this Act, including the leasing of real property for use by the Commission as an office, the Commission shall have the power to –

(1) enter into contracts and modify, or consent to the modification of, any contract or agreement to which the Commission is a party; and

(2) acquire, hold, lease, maintain, or dispose of real and personal property.

Sec. 5. Commission personnel matters.

(a) Compensation. No member of the Commission who is a private citizen shall be compensated for service on the Commission. All members of the Commission who are officers or employees of the United States shall serve without compensation in addition to that received for their services as officers or employees of the United States.

(b) Travel expenses. The members of the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code [*5 USCS §§ 5701* et seq.], while away from their homes or regular places of business in the performance of services for the Commission.

(c) Executive director, deputy executive director, general counsel, and other staff.

(1) In general. Not later than 90 days after the selection of the Chairperson of the Commission under section 2, the Chairperson shall, without regard to the civil service laws and regulations, appoint an executive director, a deputy executive director, and a general counsel of the Commission, and such other additional personnel as may be necessary to enable the Commission to perform its duties under this Act.

(2) Qualifications. The executive director, deputy executive director, and general counsel of the Commission shall be appointed without regard to 'Political affiliation, and shall possess all necessary security clearances for such positions.

(3) Duties of executive director. The executive director of the Commission shall –

(A) serve as principal liaison between the Commission and other Government entities;

(B) be responsible for the administration and coordination of the review of records by the Commission; and

(C) be responsible for coordinating all official activities of the Commission.

(4) Compensation. The Chairperson of the Commission may fix the compensation of the executive director, deputy executive director, general counsel, and other personnel employed by the Commission, without regard to the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code [*5 USCS §§ 5101* et seq., 5331 et seq.], relating to classification of positions and General Schedule pay rates, except that –

(A) the rate of pay for the executive director of the Commission may not exceed the rate payable for level III of the Executive Schedule under section 5314 of title 5, United States Code; and

(B) the rate of pay for the deputy executive director, the general counsel of the Commission, and other Commission personnel may not exceed the rate payable for level IV of the Executive Schedule under section 5315 of title 5, United States Code.

(5) Employee benefits.

(A) In general. An employee of the Commission shall be an employee for purposes of chapters 83, 84, 85, 87, and 89 of title 5, United States Code [*5 USCS §§ 8301* et seq., 8401 et seq. 8501 et seq., 8701 et seq.,

8901 et seq.], and service as an employee of the Commission shall be service for purposes of such chapters.

(B) Nonapplication to members. This paragraph shall not apply to a member of the Commission.

(6) Office of Personnel Management. The Office of Personnel Management –

(A) may promulgate regulations to apply the provisions referred to under subsection (a) to employees of the Commission; and

(B) shall provide support services, on a reimbursable basis, relating to –

(i) the initial employment of employees of the Commission; and

(ii) other personnel needs of the Commission.

(d) Detail of Government employees. Any Federal Government employee may be detailed to the Commission without reimbursement to the agency of that employee, and such detail shall be without interruption or loss of civil service status or privilege.

(e) Procurement of temporary and intermittent services. The Chairperson of the Commission may procure temporary and intermittent services under section 3109(b) of title 5, United States Code, at rates for individuals which do not exceed the daily equivalent of the annual rate of basic pay prescribed for level V of the Executive Schedule under section 5316 of such title.

(f) Staff qualifications. Any person appointed to the staff of or employed by the Commission shall be an individual of integrity and impartiality.

(g) Conditional employment.

(1) In general. The Commission may offer employment on a conditional basis to a prospective employee pending the completion of any necessary security clearance background investigation. During the pendency of any such investigation, the Commission shall ensure that such conditional employee is not given and does not have access to or responsibility involving classified or otherwise restricted material.

(2) Termination. If a person hired on a conditional basis as described in paragraph (1) is denied or otherwise does not qualify for all security clearances necessary for the fulfillment of the responsibilities of that person as an employee of the Commission, the Commission shall immediately terminate the employment of that person with the Commission.

(h) Expedited security clearance procedures. A candidate for executive director or deputy executive director of the Commission and any potential employee of the Commission shall, to the maximum extent possible, be investigated or otherwise evaluated for and granted, if applicable, any necessary security clearances on an expedited basis.

Sec. 6. Administrative support services.

Upon the request of the Commission, the Administrator of General Services shall provide to the Commission, on a reimbursable basis, the administrative support

services necessary for the (Commission to carry out its responsibilities under this Act.

Sec. 7. Termination of the Commission.

The Commission shall terminate 90 days after the date on which the Commission submits its final report under section 3.

Sec. 8. Miscellaneous provisions.

(a) Inapplicability of FACA. The Federal Advisory Committee Act (5 U.S.C. App.) does not apply to the Commission.

(b) Public attendance. To the maximum extent practicable, each meeting of the Commission shall be open to members of the public.

Sec. 9. Authorization of appropriations.

There are authorized to be appropriated not more than $ 6,000,000, in total, for the interagency funding of activities of the Commission under this Act for fiscal years 1998, 1999, 2000, and 2001, of which, notwithstanding section 1346 of title 31, *United States Code, and section 611* of the Treasury and General Government Appropriations Act, 1998 [unclassified], $537,000 shall be made available in equal amounts from funds made available for fiscal year 1998 to the Departments of Justice, State, and the Army that are otherwise unobligated. Funds made available to the Commission pursuant to this section shall remain available for obligation until December 31, 1999.

APPENDIX C

CHAPTER 4. HOLOCAUST ERA INSURANCE REGISTRY

Section

13800. Short title

13801. Legislative findings and declarations.

13802. Definitions.

13803. Holocaust Era Insurance Registry.

13804. Insurers; disclosure of information; certification.

13805. Civil penalty.

13806. Suspension of certificate of authority.

13807. Regulations.

§ 13800. Short title

This chapter shall be known and may be cited as the Holocaust Victim Insurance Relief Act of 1999. *(Added by Stats.1999, c. 827 (A.B.600), § 2, eff. Oct. 10, 1999.)*

§ 13801. Legislative findings and declarations

The Legislature finds and declares the following:

(a) During World War II, untold millions of lives and property were destroyed.

(b) In addition to the many atrocities that befell the victims of the Nazi regime, insurance claims that rightfully should have been paid out to the victims and their families, in many cases, were not.

(c) In many instances, insurance company records are the only proof of insurance policies held. In some cases, recollection of those policies' very existence may have perished along with the Holocaust victims.

(d) At least 5,600 documented Holocaust survivors are living in California today. Many of these survivors and their descendents have been fighting for over 50 years to persuade insurance companies to settle unpaid or wrongfully paid claims. Survivors are asking that insurance companies come forth with any information they possess that could show proof of insurance policies held by Holocaust victims and survivors, in order to ensure that closure on this issue is swiftly brought to pass.

(e) Insurance companies doing business in the State of California have a responsibility to ensure that any involvement they or their related companies may have had with insurance policies of Holocaust victims are disclosed to the state and to ensure the rapid resolution of these questions, eliminating the further victimization of these policyholders and their families.

(f) The international Jewish community is in active negotiations with responsible insurance companies through the International Commission on Holocaust Era Insurance Claims to resolve all outstanding insurance claims issues. This chapter is necessary to protect the claims and interests of California residents, as well as to encourage the development of a resolution to these issues through the international process or through direct action by the State of California as necessary. (*Added by Stats.1999, c. 827 (A.B.600), § 2, eff. Oct. 10, 1999.*)

§ 13802. Definitions

For purposes of this chapter, the following definitions shall apply:

(a) "Holocaust victim" means any person who was persecuted during the period of 1929 to 1945, inclusive, by Nazi Germany, its allies, or sympathizers.

(b) "Related company" means any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer.

(c) "Proceeds" means the face value or other payout value of insurance policies and annuities plus reasonable interest to date of payment without diminution for wartime or immediate postwar currency devaluation. (*Added by Stats.1999, c. 827 (A.B.600), § 2, eff. Oct. 10, 1999.*)

§ 13803. Holocaust Era Insurance Registry

The commissioner shall establish and maintain within the department a central registry containing records and information relating to insurance policies, as described in Section 13804, of Holocaust victims, living and deceased. The registry shall be known as the Holocaust Era Insurance Registry. The Attorney General, in coordination with the department, shall establish appropriate mechanisms to ensure public access to the registry. (*Added by Stats.1999, c. 827 (A.B.600), § 2, eff. Oct. 10, 1999.*)

§ 13804. Insurers; disclosure of information; certification

(a) Any insurer currently doing business in the state that sold life, property, liability, health, annuities, dowry,

educational, or casualty insurance policies, directly or through a related company, to persons in Europe, which were in effect between 1920 and 1945, whether the sale occurred before or after the insurer and the related company became related, shall, within 180 days following enactment of this act, file or cause to be filed the following information with the commissioner to be entered into the registry:

(1) The number of those insurance policies.

(2) The holder, beneficiary, and current status of those policies.

(3) The city of origin, domicile, or address for each policyholder listed in the policies.

(b) In addition, each insurer subject to subdivision (a) shall certify to any of the following:

(1) That the proceeds of the policies described in subdivision (a) have been paid to the designated beneficiaries or their heirs where that person or persons, after diligent search, could be located and identified.

(2) That the proceeds of the policies where the beneficiaries or heirs could not, after diligent search, be located or identified, have been distributed to Holocaust survivors or to qualified charitable nonprofit organizations for the purpose of assisting Holocaust survivors.

(3) That a court of law has certified in a legal proceeding resolving the rights of unpaid policyholders, their heirs, and beneficiaries, a plan for the distribution of the proceeds.

(4) That the proceeds have not been distributed and the amount of those proceeds.

An insurer who certifies as true any material matter pursuant to this subdivision, which the insurer knows to be false, is guilty of a misdemeanor.

(c) An insurer currently doing business in the state that did not sell any insurance policies in Europe prior to 1945, shall not be subject to this section if a related company, whether or not authorized and currently doing business in the state, has made a filing under this section. (*Added by Stats.1999, c. 827 (A.B.600), § 2, eff. Oct. 10, 1999.*)

§ 13805. Civil penalty

Any insurer that knowingly files information about a policy required by this chapter that is false shall, with respect to that policy, be liable for a civil penalty not to exceed five thousand dollars ($5,000), which penalty is hereby appropriated to the department to be used by it to aid in the resolution of Holocaust insurance claims. (*Added by Stats.1999, c. 827 (A.B.600), § 2, eff. Oct. 10, 1999.*)

§ 13806. Suspension of certificate of authority

The commissioner shall suspend the certificate of authority to conduct insurance business in the state of any insurer that fails to comply with the requirements of this chapter by the 210th day after this section becomes effective, until the time that the insurer complies with this chapter. (*Added by Stats.1999, c. 827 (A.B.600), § 2, eff. Oct. 10, 1999.*)

§ 13807. Regulations

The commissioner shall adopt rules to implement this chapter within 90 days of its effective date. The rules shall be adopted as emergency regulations in accordance with Chapter 3.5 (commencing with Section 11340) of the Government Code, and for the purposes of that chapter, including Section 11349.6 of the Government Code, the adoption of the rules shall be considered by the Office of Administrative Law to be necessary for the immediate preservation of the public peace, health and safety, and general welfare. (*Added by Stats.1999, c. 827 (A.B.600), § 2, eff. Oct. 10, 1999.*)

APPENDIX D

Testimony of Leslie Tick
California Department of Insurance
United States House of Representatives
Government Reform Subcommittee on
Government Efficiency, Financial Management
and Intergovernmental Relations.
September 24, 2002
2:00 pm.

Good afternoon. My name is Leslie Tick. I am senior staff counsel at the California Department of Insurance. I have been with the Department for the past 10 years and have worked on the Holocaust-era insurance issue since late 1997.

In pre-war Europe, insurance was sold extensively and primarily to middle and working class people. Many individuals invested in life insurance policies and in annuities because retirement planning tools, such as pensions, were not widely available. Dowry and education policies were also very common during this time. These policies were purchased when a child was born and paid when a daughter married or a son commenced higher education.

As the religious, ethnic and political repression preceding World War II spread, and later, as the war and Holocaust enveloped Europe, more people purchased insurance products in an effort to keep their assets safe.

Over the past 50 years, some insurers have consistently refused to pay benefits or provide information about these policies. The reasons given for non-payment include:

- No death certificate provided by the claimant;
- Policyholders stopped making premium payments during the war;
- Proceeds of policies sold to Jewish insureds were already paid to the Nazis or nationalized;
- Reparations to Holocaust survivors were made by government restitution treaties, which covered insurance proceeds;
- Companies located in eastern bloc countries were taken over by communist regimes and their assets were confiscated so that no funds exist to pay claims; and
- Records no longer exist to verify the individual's status as a policyholder beneficiary.

An estimated 50,000 to 100,000 Holocaust survivors live in the United States. California has the second largest number of survivors with estimates ranging from 6,300 to 20,000 survivors. If these policies were paid today, at present value with currency adjustments and interest, it is estimated that the total due could reach into the hundreds of millions of dollars.

In order to see that justice is done and provide assistance to those survivors who may wish to file claims on these policies, information needs to come from the insurance companies. Most survivors and their heirs no longer have documentary proof of insurance. Most survivors were children during the war. Some recall details regarding insurance – the agent coming to their home for payment, or their parents telling them that they were insured. The majority of claimants, however, have no actual knowledge of whether or not their family members were insured, but believe they must have been because of their social and

economic status, business holdings, or because they believe that their parents took good care of the family.

The International Commission on Holocaust Era Insurance claims (ICHEIC) was formed in August 1998 to try to address the issues surrounding these policies in a consensual manner. The ICHEIC is made up of a few European insurers (Allianz, Generali, Zurich, AXA and Winterthur), American and European insurance regulators, representatives of Jewish and survivor organizations, and the State of Israel. In order to address the problem of claimants' lack of records, ICHEIC required each member company to provide a list of unpaid policies issued to Holocaust victims. It was envisioned that this list would be made available to the public so that potential claimants would be able to see if they or their relatives had a policy.

ICHEIC required that its member companies provide lists of policies held by victims of the Holocaust, but left each insurer to decide who was and who was not a victim of the Holocaust. Even if some names are known as "Jewish names" a company cannot determine with certainty which policyholder was, or was not, a Jew. And for those who were victims by virtue of the fact that they were homosexual, Roma, disabled, or Jehovah's Witness, for example, it would be entirely impossible.

Another problem arose from ICHEIC's requirement that the insurers provide policyholder names just for those policies that remained unpaid. There was a widespread practice during the pre-war and war years for the Nazis to confiscate policies outright or for the policies held by victims to be paid into "blocked accounts." These "blocked accounts" were in the policyholder's name, but the account only worked one way. The accountholder was forced to

deposit his assets, but was not allowed to make any withdrawals. Unfortunately, the insurers considered these policies to be "paid" even though they were not paid to the beneficiary of the policy, and these names were not included on the lists.

Another problem with the ICHEIC lists is that most of the ICHEIC insurers simply refused to provide lists, saying that European law would forbid such disclosure, or saying that it would simply take too much time and cost too much money to collect the data. Allianz, for example, with approximately 1.3 million paper files, refused to put the information into electronic format, citing cost and difficulty and its decision that such an effort would be unlikely to yield enough Jewish policyholders to make the exercise cost effective. Allianz eventually agreed with ICHEIC to digitize information regarding a small sampling of the 1.3 million policies and to match those names against the Yad Vashem[1] database of Jews killed in the Holocaust, in order to determine which of the policies were victims of the Holocaust. The Yad Vashem database, however, contains the names of only about half of Jewish victims of the Holocaust. The matching was ultimately never done, as Allianz was not willing to agree to the Yad Vashem matching system and so, to date, there are no Allianz names on the ICHEIC database that came from this exercise.

ICHEIC also undertook limited research of non-insurer archives for evidence of individual policies. ICHEIC searched state archives in various locations around

[1] Yad Vashem is the Holocaust memorial in Israel, which to date, has the world's largest collection of names of Jewish Holocaust victims.

Europe and looked mostly at documents reflecting the forced documentation of Jewish assets to be either taxed by or collected by the Nazis. These names were collected in ICHEIC's research database and were added to the policyholder database that is publicly available on ICHEIC's website (www.icheic.org).

To date the ICHEIC policyholder database contains 59,244 policyholder names. Only 15% of those names (8,929) came from ICHEIC's member insurers. Of the 8,929 provided by the insurers, 94% (8,388 names) come from just one company. Generali, which provided 94% of the names on the ICHEIC database, actually collected information on 360,000 policies in force in 1939 but was only willing to give ICHEIC a smaller list of 90,000 "unpaid" policies. Those were then matched against the Yad Vashem list, resulting in the 8,388 names currently published.

When the German Foundation negotiations are completed, the German insurers say that they will provide a list of names of policies in force, to be matched against a list of German Jews. Virtually none of these names will come from Allianz, as the German insurers agreed to provide those names that were already in electronic format. The resulting matched names will be added to the ICHEIC website database. Since the matching will be done against a list of German Jews, it will not capture homosexual, disabled, Jehovah's Witness or Roma victims of the Nazis.

In contrast to the ICHEIC list requirements, AB 600, codified as California Insurance Code § 13800 (attached) directs insurers to provide to the Department data regarding *all* insurance policies they or a related company wrote in Europe between 1920 and 1945. This requirement addresses the problem of insurers deciding for themselves

who was and who was not a victim of the Nazis and deciding which policies were paid and which were not paid. It also allows survivors and the families of victims who were not targeted because they were Jews, to be able to search for names.

The statute directs the Department to suspend the certificate of authority of any insurer that fails to comply. The statute required insurers to provide their data to the Department of Insurance by April 10, 2000.

Beginning in March 2000, various insurance companies (Gerling, Generali, American Reinsurance, Winterthur) and the trade association American Insurance Association (representing an additional one hundred or so insurers), filed four separate federal lawsuits against the California Insurance Commissioner asserting that the statute and its implementing regulations violated their federal constitutional rights.

On June 9, 2000, the United States District Court for the North District of California granted plaintiffs' request and enjoined enforcement of the statute.

On February 7, 2001, the United States Court of Appeals for the Ninth Circuit rejected the insurers' commerce clause and foreign affairs constitutional challenges. (Opinion attached as Exhibit 2). The Court kept the injunction in place pending proceedings on the merits regarding due process, the insurers' one remaining constitutional challenge.

In September 2001 the parties argued cross motions for summary judgment on the due process issues. On October 1, 2001, the District Court denied the Commissioner's Motion for Summary Judgment and granted Plaintiffs'

motions, finding that the statute violated the insurers' due process rights.

Both sides took the due process ruling back to the 9th Circuit Court of Appeals. The Court heard oral argument on May 8, 2002.

On July 15, 2002, the Court of Appeals ruled that the statute was not unconstitutional for any of the reasons set forth by plaintiffs (amended Opinion attached as Exhibit 3).

The Court of Appeals denied plaintiffs' request for rehearing en banc on September 9, 2002.

On September 13, 2002 the insurers requested that the Court stay the ruling pending their request to the United States Supreme Court that it hear the case.

Prior to the injunction, which prevented the California Department of Insurance from enforcing the statute, approximately 1,500 California insurers submitted reports.

Four groups representing approximately eight insurers provided reports that fully comply with the statute.

Four groups representing approximately forty-three California insurers provided partial, incomplete submissions, such as policy information regarding unpaid policies issued to Holocaust victims.

The Department has further questions regarding the reports submitted by five groups representing approximately fifty-eight insurers.

Approximately one hundred insurers refused to comply.

The remainder, and overwhelming majority of the insurers reported that they either wrote no insurance in Europe during the applicable time period or that they searched and were unable to find any data responsive to the statute.

APPENDIX E

Statement of Representative Henry A. Waxman Ranking Minority Member Committee on Government Reform at the Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations Hearing on H.R. 2693 September 24, 2002

Today we are holding a hearing on important legislation to help rectify a terrible injustice. The bill is the Holocaust Victims Insurance Relief Act (H.R. 2693). It addresses one of the most difficult problems faced by Holocaust survivors and their families when they seek restitution from insurance companies that have refused to pay claims held by victims of Nazi persecution: How to identify the insurance company that issued the policy.

At the outset, I would like to thank Chairman Horn and Ranking Member Schakowsky. They are both original cosponsors of the legislation before us today. I am very pleased that they have agreed to schedule this hearing to help achieve justice for Holocaust survivors and their families.

The history of Holocaust insurance is shameful. After the war, survivors filing claims for life insurance often were rejected for the cruelest of reasons. Some survivors were rejected because they could not produce death certificates for loved ones who perished in Nazi concentration camps. Other insurance companies took advantage of the fact that claimants had no policy documents to prove their policy existed. In many cases, survivors recalled that their families had insurance but could not name the company holding their assets.

In 1998, the International Commission on Holocaust-Era Insurance Claims (ICHEIC) was set up as a forum for the insurance companies to expeditiously settle outstanding policies. In November 2001, our full Committee held an oversight hearing on the ICHEIC process. We found the work of ICHEIC disheartening.

At the time, ICHEIC had received 77,800 claims for restitution, but had resolved only 758 – less than 1%. Today, nearly a year later, the statistics are not much better.

One of the main problems confronting the ICHEIC process was the difficulty in getting names of Holocaust-era policyholders. At the time of the hearing, less than 10,000 policyholder names had been published by the companies involved in ICHEIC and most of those names came from just one company. Without comprehensive policyholder lists to search for the names of family members, more than 80% of ICHEIC applicants filed incomplete claims naming no insurance company at all. As a result, the rate of claims approval was very small.

A representative case is that of Israel Arbeiter, a Holocaust survivor who was born in Poland and came to the United States after being liberated from Auschwitz. As he testified at last year's hearing, Mr. Arbeiter knows his family had insurance policies because he vividly remembers that every week an agent of an insurance company visited his home to collect premiums. The records were kept in a ledger left behind when the Nazi SS stormed into his home in February 1941. But he never knew which company had issued the policies of his parents and uncles who were killed at the Treblinka death camp. As a result, ICHEIC has been unable to resolve his claim.

The purpose of the legislation we are considering today is to help Mr. Arbeiter and the countless others who are in the same situation. H.R. 2693 requires all insurance companies operating in the United States to provide information about Holocaust-era policyholders to the U.S. government for publication by the Holocaust-Era Assets Recovery Project of the National Archives.

We know this bill can work. It is patterned after a California state law which has already produced positive results within California. In fact, we will hear today from MONY Life Insurance, an insurance company that is fully complying with the California law. Because of the California law, policy information is getting out of companies' archives and into the hands of the rightful beneficiaries.

There has been one positive development recently. Today, we will have the opportunity to hear about a new agreement that was announced last week between ICHEIC and the companies in the German Insurance Association. Under the agreement, the names of Jewish policyholders who lived in Germany after 1933 are to be released publicly. Assuming that the German insurance companies actually comply and that a reliable list of Jews who lived in Germany can be compiled, this could help many families in filing restitution claims.

But this agreement – welcome as it may be – will not solve the problems. For one thing, it will not help Mr. Arbeiter and others like him because he came from areas under Nazi control, not Germany proper.

What's clearly needed is a legislative response by Congress that will in effect compel recalcitrant insurance companies to provide complete lists of Holocaust-era policyholders. That's the goal of H.R. 2693.

Again, I commend Chairman Horn for holding this hearing and I look forward to hearing from the witnesses.

APPENDIX F

**Prepared Statement of David S. Waldman,
Vice President-Chief Operations Counsel
MONY Life Insurance Company
For the House Committee on the Government
Reform's Sub-committee on Government
Efficiency, Financial Management
and Inter-Governmental Relations
Hearing on H.R. 2693 on
September 24, 2002**

Good afternoon, honorable members of the Sub-Committee. My name is David Waldman and I am the Vice President-Chief Operations Counsel of MONY Life Insurance Company, formerly The Mutual Life Insurance Company of New York, which was chartered in 1842 and issued the first mutual life insurance policy in the United States. It was my responsibility to provide legal advice to the team of individuals at our Company who prepared and filed the reports required under the various state Holocaust Victim Insurance Relief Acts, including that of California. Thank you for inviting me to testify before this Committee and for affording me the opportunity to share with you our experience in complying with the California Act.

In response to the enactment of the various state Holocaust Victim reporting laws applicable to insurance companies, MONY conducted an extensive and exhaustive examination of its records relating to its European business, including an attempt to identify any policies sold to persons in Europe that would have been in effect between 1920 and 1945.

Such records as did exist indicated that MONY sold life insurance and annuity products in Europe in the early 1900's. However, MONY completely discontinued writing new business in Europe by 1914. Moreover, it appeared that in the 1920-26 time period, MONY disposed of virtually all its existing European business by transfer, with the consent of the policyholder, to European domiciled insurers.

There were a number of policies in various European countries that were not transferred, and we conducted a detailed investigation of any documentation we might have concerning them. There were several boxes of paper files, related record cards on microfilm and policy payment vouchers in the archives area of our record center dating back to the relevant time period. The review of our paper files resulted in the identification and inputting of 6,813 potentially relevant policies.

The next step was the retrieval of material data on these policies as well as on an eventual 4,700 additional policies which were identified in our records center as potentially relevant. This investigative process resulted in the definite identification of 6,149 policies sold to persons in Europe, as defined under the California Act, that were in effect between 1920 and 1945. We reviewed our records from that era including cards denoting policy status in numerical order covering the entire period in question and vouchers evidencing payment dating from 1926. The data obtained from this research, together with any additional information obtained from our files, was then input into our database and organized into a format conforming with the prescriptions of the Act.

Subsequent to this initial examination, we embarked upon a second phase which consisted of a direct review of all our policy records during the relevant time period and an identification of the policies derived from those records sold to persons in Europe that were in effect between 1920 and 1945. The number of policies identified in this second phase was 27,603. The data for these policies was combined with that for the 6,149 identified in the first phase and incorporated into a report reflecting the data for the total of 33,752 policies.

The review of our records resulted in our finding only two cases identifiable as Holocaust Victim claims, one with an agency of record of Brussels and the other in the United States. Both included references to concentration camps on the death benefit voucher as the cause of death; one indicated payment of proceeds in 1945 and the other in 1950. In addition, there was one claim with a cause of death listed as "killed by Germans;" and payment of proceeds was indicated in 1949.

The interpretation and inputting of data from our files was an extremely resource-intensive and time-consuming task. We eventually had four persons in our Operations area and three temporary workers dedicated full-time to the project, and expended over 8,286 hours in identifiable staff time.

This work did serve as the basis for our reports to all the states that have enacted Holocaust Victim Insurance Relief Acts, although some adjustments were needed to define and populate the databases used in the various states due to the differing wording in their laws, particularly in the time periods and geographic areas covered. For example, while California law applies to policies in effect between

1920 and 1945 and sold to persons in areas in the European Continent that were at some time occupied or controlled by Nazi Germany or its allies, other state laws apply to policies issued between 1920 and 1945 to a Holocaust Victim which may include persons in any other neutral European country or area in Europe under the influence or threat of Nazi invasion. The database we created also allowed us to respond in quick order to inquiries we received on particular individuals either directly, through State Insurance Departments or from the International Commission on Holocaust Era Insurance Claims. I may add that in no case was there any documentary evidence of a failure on our part to pay, or an improper payment of, the proceeds of a policy on the life of a Holocaust Victim or the claim of a Holocaust Survivor, or any attempt on our part to avoid our contractual obligations under any of the policies found in our records.

In closing, I would like to express my appreciation to the extremely dedicated group of individuals MONY Life assigned to this project who worked tirelessly and with heartfelt concern for the subject matter until it was completed, and to MONY Life which willingly devoted the resources necessary to do a good job, not only because it was the law but also because it was the right thing to do.

Exhibit A

Assumptions Underlying California Report

In some cases the terminology prescribed for the layout was not reflective of the actual policy designations or transactions; in such cases we added appropriate descriptions. As the records requested were from a time that extended well beyond what our normal record retention

guidelines would have covered, much of the data was nonexistent, illegible, and/or incomplete, which we indicated on the report, except in such cases where we were able to make reasonable assumptions. A synopsis of those assumptions follows.

1. A policy was included in the report where our records indicated a City or country of Origin or Domicile in Europe as defined in the California regulations and a year reflecting an in force status between 1920 and 1945.

2. The agency of record where the policy was issued and the location of that agency were reported as Policyholder and Insured City/Country of Domain, which corresponded to City of Origin or Domicile and Country in California's prescribed layout.

3. Since the policy payment vouchers in our records only dated from 1926, the best evidence of payment prior to that date was the record cards. Payment would ordinarily have been made within one year of the effectuating event. Consequently, if the record card noted that a policy that went out of force prior to 1926 was a death or maturity, we assumed that payment of the proceeds was made to the person entitled to them under the policy. Conversely, if the record card noted that a policy went out of force 1926 or later, we did not report that a payment was made on a death or maturity unless there was a corresponding payment voucher for the policy. If there was a payment voucher for the policy, then we assumed that payment was made. Where the record card noted a surrender, we assumed that payment was made to the person entitled to payment for all years regardless of whether there was a payment voucher for the policy, since a surrender would have been precipitated by the policyholder contacting us

and minimal requirements would have been applicable to payment.

4. With regard to policy payment vouchers, the standard guidelines we followed were to look for a voucher for the year noted on the policy record card plus an additional seven years (a typical escheat period of the time) for a death or maturity, but only one additional year for a surrender based on the same reasoning that resulted in our differentiated treatment of surrenders under 3. above.

5. If payment was made, then we assumed it was made to the person entitled to payment under the policy unless there was documentation to the contrary. This would have been reported as Bene/Heir in accordance with California's prescribed layout even though the payee would generally have been, for example, the owner in the case of a surrendered policy or a matured endowment and the annuitant in the case of a supplementary annuity contract in settlement of a policy. For annuities, the annuitant was also reported as the Insured. When our records only reflected a person named with no identifying label, we assumed that person was the Insured.

6. N/R inserted in a field indicated either that no records existed for that field, the records we did have in our files for that field were illegible, incomplete or otherwise nonresponsive, or the field was not applicable (e.g., payee data where proceeds were not payable).

7. Amount of proceeds was only reported where our files indicated Unpaid, in accordance with California's prescribed layout. The amount unpaid was reported in the Amount Paid field only if the amount was known to us. If the amount was not known to us, it was reported as N/R. If our files indicated Paid, that field was reported as N/R,

which in this case denoted not applicable (to California's reporting requirements).

8. For payments assumed prior to 1926 (where no vouchers would have existed), payment method (if applicable) was reported N/R (no records exist). For payments made after 1926 (where a voucher was found), it was assumed that payment method (if applicable) was Paid Directly unless there was documentation to the contrary.

9. Where our records identified a year for a transaction or occurrence but not an exact date, it was assumed that it took place at the end of that year.

10. In the case of apparently inconsistent data in our records, it was assumed that the most recent data was also the most accurate.

APPENDIX G

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GERLING GLOBAL REINSURANCE CORP. OF AMERICA; GERLING GLOBAL REINSURANCE CORP. – U.S. BRANCH; GERLING GLOBAL LIFE REINSURANCE COMPANY; GERLING GLOBAL LIFE INSURANCE COMPANY; GERLING AMERICA INSURANCE COMPANY; and CONSTITUTION INSURANCE CORP., Plaintiffs-Appellees, v. HARRY W. LOW,* in his capacity as the COMMISSIONER OF INSURANCE OF THE STATE OF CALIFORNIA, Defendant-Appellant,	No. 00-16163 D.C. No. CV-00-00506-WBS

* Harry W. Low is substituted for his predecessor as Commissioner of Insurance for the State of California. Fed. R. App. P. 43(c)(2).

ASSICURAZIONI GENERALI. Plaintiff-Appellee. v. HARRY W. LOW, individually, and in his capacity as the INSURANCE COMMISSIONER for the STATE OF CALIFORNIA, Defendant-Appellant.	No. 00-16164 D.C. No. CV-00-00875-WBS (Filed Mar. 29, 2001)

* * *

Paez have voted to deny the petition for rehearing en banc, and Judge Goodwin has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing and petition for rehearing en banc are DENIED.

APPENDIX H

Nos. 00-16163, 00-16164, 00-16165, and 00-16182

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GERLING GLOBAL REINSURANCE CORP.
OF AMERICA, et al.,

Plaintiffs-Appellees,

v.

CLARK KELSO in his capacity as the
COMMISSIONER OF INSURANCE OF THE
STATE OF CALIFORNIA,

Defendant-Appellant.

BRIEF FOR AMICUS CURIAE
THE UNITED STATES OF AMERICA
IN SUPPORT OF AFFIRMANCE

ON APPEAL FROM A PRELIMINARY
INJUNCTION ENTERED BY THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA,
THE HONORABLE WILLIAM B. SHUBB

DAVID W. OGDEN
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* * *

legal peace," undertakes to "use its best efforts; in a manner it considers appropriate, to achieve these objectives with state and local governments." Art. 2(2).

The Foundation Agreement and the United States' role in its negotiation are unique. The Foundation Agreement is not a government-to-government claims settlement agreement. As the Agreement makes clear, U.S. policy interests favor "dismissal on any valid legal ground," of all "National Socialist and World War II era cases against German companies." Annex B ¶ 3. And the United States undertakes to explain that interest in court proceedings and to take appropriate steps to achieve the objectives of the Agreement with state and local governments. Art. 2(1), (2). At the same time, the Agreement also makes explicit that "the United States does not suggest that its policy interests concerning the Foundation in

themselves provide an independent legal basis for dismissal" of private claims against German companies. Annex B, ¶¶ 3, 7. The Foundation Agreement reflects the United States' policy of fostering voluntary cooperation between the victims' constituencies on one side and the German government and companies on the other to bring expeditious justice to the widest possible population of survivors.

In addition to the Foundation, the United States has also encouraged participation in the International Commission of Holocaust Era Insurance Claims ("ICHEIC"), a voluntary organization which has established procedures for the processing and payment of Holocaust-era insurance claims. As part of the Foundation Agreement, the German government has agreed that such insurance claims against German insurance companies will be processed on the basis of claims-handling procedures established by the ICHEIC. Art. 1(4). ICHEIC is a voluntary organization, chaired by former United States Secretary of State Lawrence S. Eagleburger, formed by five European insurance companies (including plaintiffs Generali and Winterthur), the State of Israel, Jewish organizations, and the National Association of Insurance Commissioners.[2] The State Department has stated that ICHEIC "should be recognized as the exclusive remedies for all insurance claims that date to the Nazi era" and has "encourag[ed] all insurance companies that wrote policies during the Nazi era to join the ICHEIC." State Department Press Statement, Feb. 15,

[2] The United States has observer status in ICHEIC, together with several European nations, including Germany, France, Italy, Poland, and the Czech Republic.

2000.[3] The United States continues to urge all insurance companies that issued Holocaust-era insurance policies to join ICHEIC.

In view of the importance of the Foundation Agreement, we wish to correct some misunderstandings reflected in the brief of the American Insurance Association ("AIA") concerning the undertakings of the U.S. Government and the impact of the procedures established by the Agreement on existing legal remedies available to American citizens against private corporations. AIA states that "[t]he federal government ... has committed to give affected insurers legal peace, including against state litigation and regulatory action," AIA Br. 1, and that the Foundation Agreement "imposes a duty on the United States to achieve 'all-embracing and enduring legal peace' for German companies." AIA Br. 2. The United States has committed to various unprecedented undertakings in the Agreement. As discussed, the United States has committed to file a Statement of Interest in private suits against German companies explaining that "it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving such claims," Foundation Agreement, Art. 2(1), and has committed to "use its best efforts, in a manner it considers appropriate, to achieve the objectives" of the Agreement, Art. 2(2). It has not, however, undertaken a "duty ... to

[3] Deputy Secretary Eizenstat has likewise stated that the "U.S. Government has supported the International Commission ... since it began, and we believe it should be considered the exclusive remedy for resolving insurance claims from the World War II era." Statement before the House Banking Committee, Feb. 9, 2000 (ER 1905).

achieve" legal peace for German companies against state litigation and regulatory action.

Nor does the Foundation Agreement itself preclude individuals from filing suit on their insurance policies in court. *Cf.*, *e.g.*, AIA Br. at 2 (stating that the Agreement "creates on exclusive remedy and forum"); *id.* at 12 (stating that the Agreement "mandates that insurance claims that come within the scope of . . . ICHEIC 'shall be processed . . . on the basis of such procedures' "). Although the Agreement obligates the German Foundation to process insurance claims against German companies according to ICHEIC procedures, Foundation Agreement, Art. 1(4), it does not mandate that individual policyholders or beneficiaries bring their claims in that forum. And while the Agreement states that it is in the national interest of the United States that the Foundation be the exclusive forum for such claims, it does not "create" an exclusive remedy; rather, it specifically declares that "[t]he United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent basis for dismissal" of private claims. Foundation Agreement, Annex B, ¶ 7.[4] As we discuss below, the premises underlying the Agreement and the California statutes are plainly different. But AIA is mistaken in asserting that the Foundation Agreement [is] in "direct conflict" with California law (AIA Br. 4), if, by this, AIA means to suggest

[4] The district court, which rendered its decision before the Agreement was finalized, also overestimated the Agreement's ultimate legal affect when it predicted that the Agreement would make the Foundation an "exclusive remedy" as a matter of U.S. law. Memorandum and Order: Preliminary Injunction at 17.

that the Agreement by its terms preempts the California statute.

For the reasons set out below, we believe that there are substantial questions that the California statute impairs interests protected by the Foreign Commerce clause and other constitutional restraints and that these questions justify a preliminary injunction. But affirmance of the district court's order should not rest on any misunderstanding about the scope of the Foundation Agreement.

* * *

APPENDIX I

Nos. 00-16163, 00-16164, 00-16165, and 00-16182

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GERLING GLOBAL REINSURANCE CORP.
OF AMERICA, et al.,

Plaintiffs-Appellees,

v.

HENRY W. LOW, in his capacity as the
COMMISSIONER OF INSURANCE OF THE
STATE OF CALIFORNIA,

Defendant-Appellant.

BRIEF FOR AMICUS CURIAE
THE UNITED STATES OF AMERICA
IN SUPPORT OF REHEARING EN BANC

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* * *

interests" for the designated claims process "to be the exclusive remedy and forum for the resolution of, all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II."[6]

The problem with the California legislation is not that it contravenes specific provisions of the Executive-Agreements – it does not.[7] But when a state projects itself

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[6] Agreement Art. 1(1). The Agreement with Austria contains a substantially similar provision, which extends as well to claims against the government of Austria. The U.S.-Swiss Joint Statement expresses a similar policy for claims against Swiss companies, though it does not have the force of an Executive Agreement.

[7] Plaintiffs are wrong to represent that the panel's decision has placed "major international agreements ... in jeopardy" and that Holocaust survivors "will get no relief from the German Foundation so long as the panel's decision remains in effect." Under German law, the contribution of German companies to the Foundation, and payments to victims, depend upon a determination by the German Parliament that "adequate legal security" exists. This determination is to be based on the dismissal of lawsuits that were pending at the time the Foundation

(Continued on following page)

into the realm of foreign affairs, its activity may threaten the efficacy of the national government's efforts. That danger is very much present here. The

* * *

Agreement was signed, primarily class action cases, that assert claims *against* German companies that arise out of the Nazi era. This case, however, does not involve claims against any German company – indeed the litigation was brought by the insurance companies themselves – and, therefore, is not one that implicates the German obligation to make payments from the Foundation.

Plaintiffs also err in asserting that the German Foundation Agreement and other international agreements contain a "promise of comprehensive 'legal peace' – in particular, protection of European companies from litigation and from other state and local action, including the HVIRA." App. Pet. at 7. *see also* App. Pet. at 6 (negotiations "premised on a guarantee of 'legal peace' from statutes like the HVIRA"). The Foundation Agreement makes clear that the achievement of "legal peace" for German companies in the context of full implementation of the Foundation is in the foreign policy interests of the United States. Foundation Agreement, Art. 2(1), Annex B, ¶¶ 3, 4. However, the Foundation Agreement does not provide a "promise" or "guarantee" of legal peace.

APPENDIX J

[An unofficial/informal translation of the Bundestag resolution, adopted on May 30, 2001, obtained from the United States Department of State.]

Motion introduced by the parliamentary groups of the SPD, CDU/CSU, Alliance90/Greens, FDP and PDS

Determination of Adequate Legal Certainty for German Enterprises Pursuant to Section 17, Para. 2 of the Law on the Creation of a Foundation "Remembrance, Responsibility, and the Future"

The German Bundestag determines:

1. The Law on the Creation of a Foundation "Remembrance, Responsibility, and the Future" of August 2, 2000 stipulates in Section 17, Para. 2: "The first allocation of funds to the Foundation requires as preconditions the entry into force of the German-American Executive Agreement concerning the foundation "Remembrance, Responsibility, and the Future," and the establishment of adequate legal certainty for German enterprises. The German Bundestag shall determine whether these preconditions exist." The German-Americans Executive Agreement entered into force on October 19, 2000. The German Bundestag shares the view held by the Special Commissioner of the Federal Chancellor, Dr. Otto Count Lambsdorff, and the Federal Government, as well as the concurrent opinion of the Foundation Initiative of German Industry that adequate legal security exists for German enterprises.

2. The German Bundestag determines that adequate legal security has been established pursuant to Section 17,

Para. 2 of the Law on the Creation of a Foundation "Remembrance, Responsibility, and the Future."

The Foundation "Remembrance, Responsibility, and the Future" is therefore authorized to make funds of the foundation available to the partner organizations pursuant to Section 17, Para. 1 of the Law.

3. The German Bundestag takes note of the fact that the Foundation Initiative, according to number 4d of the "Joint Declaration" of July 17, 2000, will pay the contribution of the German enterprises in the amount of DM 5 billion plus at least DM 100 million to the Foundation "Remembrance, Responsibility, and the Future." The German Bundestag understands that these funds will be transferred immediately to the Foundation "Remembrance, Responsibility, and the Future."

Berlin, May 30, 2001

Dr. Peter Struck and parliamentary group
Friedrich Merz and parliamentary group
Kerstin Mueller, Rezzo Schlauch and parliamentary group
Dr. Wolfgang Gerhardt and parliamentary group
Roland Claus and parliamentary group

APPENDIX K

Nos. 01-17023 and 01-17433

UNITED STATES COURT OF APPEALS
IN THE NINTH CIRCUIT

GERLING GLOBAL REINSURANCE CORP. OF AMERICA; GERLING GLOBAL REINSURANCE CORP. – U.S. BRANCH; GERLING GLOBAL LIFE REINSURANCE COMPANY; GERLING GLOBAL LIFE INSURANCE COMPANY; GERLING AMERICA INSURANCE COMPANY; and CONSTITUTION INSURANCE COMPANY,

Plaintiffs-Appellees/Cross-Appellants,

v.

HARRY LOW in his capacity as the COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,

Defendant-Appellant/Cross-Appellee.

Appeal from the United States District Court
for the Eastern District of California
Honorable William B. Shubb, District Judge
CIV-S-00-0506 WBS JFM and Consolidated Cases

MOTION OF THE FEDERAL REPUBLIC OF GERMANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE SUPPORTING AFFIRMANCE OF SUMMARY JUDGMENT FOR PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

ROGER M. WITTEN
WILMER, CUTLER & PICKERING
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March 18, 2002

* * *

BAV exercises its authority by issuing "circulars" to insurance companies in Germany. The BAV has reviewed and continues to review the practices of German insurance companies regarding Holocaust-era policies and, in this regard, has issued Circular 1/1999, which requires insurance companies in Germany to "re-check if any benefits to policyholders or beneficiaries under life insurance contracts concluded before 1945 (historical portfolio) are still outstanding."[1]

2. German Sovereignty over the Disclosure of Private Data by German Companies

The Federal Republic also has sovereign authority to regulate the disclosure by German companies in Germany of private personal data concerning German citizens. Pursuant to this sovereign right, the Federal Republic has enacted privacy laws, including the Federal Data Protection Law (Bundesdatenschutzgesetz or BDSG). The BDSG

[1] BAV Circular 1/1999, "Life Insurance Contracts of Jewish and Other Victims of National Socialist Persecution," *available at* http://www.bav.bund.de/en/rundschreiben/r/1999/1.html.

broadly prohibits the disclosure of private data in all sectors of the German economy, including the disclosure of certain information regarding insurance policy records by German insurance companies without the express authorization of policyholders or their beneficiaries. § 28(2) Nr. 1b BDSG. Unauthorized disclosure of private data may result in civil and criminal penalties.

* * *

APPENDIX L

[SEAL]

THE TREASURER OF THE STATE OF FLORIDA
DEPARTMENT OF INSURANCE

BILL NELSON

IN THE MATTER OF:

HOLOCAUST VICTIMS
INSURANCE ACT ENFORCEMENT
PROCEEDING

CASE NO. 31393-99-SC

_____/

INVESTIGATIVE SUBPOENA FOR RECORDS

TO: GERLING GLOBAL LIFE REINSURANCE COMPANY
717 FIFTH AVENUE
NEW YORK, NEW YORK 10022
SERVE: RECORDS CUSTODIAN

In accordance with the authority conferred by Sections 624.307, 624.317, 624.318, 624.321, and Chapter 626, Florida Statutes, the FLORIDA DEPARTMENT OF INSURANCE AND TREASURER (hereafter, the "DEPARTMENT"), is conducting an investigation concerning the insurance activities of GERLING GLOBAL LIFE REINSURANCE COMPANY with respect to its compliance with Section 626.9543, Florida Statutes ("Holocaust Victims Insurance Act"). In furtherance of that investigation, the DEPARTMENT issues this Investigative Subpoena for Records to the entity named above. For the purpose of this investigation and records subpoena, GERLING GLOBAL LIFE REINSURANCE COMPANY includes the entity of that name, as well as any and all other entities that are or were under the control of, that were acquired by, that were merged with or into, or that

now have or have in the past had any organizational, managerial, or operational connection with GERLING GLOBAL LIFE REINSURANCE COMPANY, including, but not limited to as a parent company or as a subsidiary.

YOU ARE THEREFORE COMMANDED to produce, within sixty (60) days from the date of service upon you of this Investigative Subpoena, all materials and information designated on the attached list, regardless of the form or media in which it exists or is stored. If you contend with respect to any request, that records or information is not available, you are required to explain in detail all efforts employed to locate the requested documents or information. Production is to be made at the following location: Florida Department of Insurance, Division of Legal Services, 6th Floor, Larson Building, 200 East Gaines Street, Tallahassee, Florida 32399-0333 (Attention: Luke S. Brown, Esq.).

You must comply with this subpoena by producing true and correct copies of the requested materials to the DEPARTMENT at the place and within the time specified in this subpoena. You will not be required to surrender to the Department the originals of the materials to be provided. Any objections to the production of documents pursuant to this subpoena must be made as soon as reasonably possible before the date that production is due, by serving written notice of specific objections and the grounds therefor to the undersigned attorney.

BILL NELSON
Treasurer and Insurance
Commissioner

By: /s/ Dennis Silverman
DENNIS SILVERMAN, ESQ.
Assistant Director
Division of Legal Services
KAREN ASHER-COHEN, ESQ.
LUKE S. BROWN, ESQ.
612 Larson Building
200 East Gaines Street
Tallahassee, Florida 32399-0333
Telephone: (850) 413-4118

DEFINITIONS OF TERMS USED IN THIS REQUEST

A. "COMPANY" means the entity named upon the face of this subpoena, as well as any and all other entities that are or were under its control, that were acquired by it, that were merged with or into it, or that now or have at any time in the past had any organizational, managerial, or operational connection with it including, but not limited to, as a parent company or as a subsidiary.

B. "DEPARTMENT" means the Florida Department of Insurance.

C. "HOLOCAUST VICTIM" or "VICTIM" means any person who lost his or her life or property as a result of discriminatory laws, policies, or actions targeted against discrete groups of persons between 1920 and 1945, inclusive, in Nazi Germany, areas occupied by Nazi Germany, or countries allied with Nazi Germany.

D. "INSURANCE POLICY", "POLICY", "INSURANCE POLICIES" or "POLICIES" means all insurance policies, including but not limited to life and property and casualty insurance policies, that were issued by the COMPANY and that were in force at any time between

1920 and 1945, inclusive, in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany.

E. SPECIFIED TIME PERIOD means the years 1920 through 1945, inclusive.

MATERIALS AND INFORMATION TO BE PRODUCED

1. All company files documenting the existence of insurance policies that were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany during the specified time period.

2. All duplicate policies. For purposes of this request, a "duplicate policy" is a copy, a second original, or other reproduction of an insurance policy that was in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time during the specified time period.

3. All records pertaining to policy number designations and prefixes for policies that were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time during the specified time period, including any and all explanatory information as to the numbering or other identification system utilized.

4. All cancellation notices or documents of similar import issued by or on behalf of the company with respect to any policies that were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany during the specified time period.

5. All premium registers or similar data compilations that document gross premiums received by the company on policies issued by it that were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time during the specified time period. If your response to this request is in the form of a data compilation, it should be categorized by year and by Country and City.

6. With respect to each policy that was in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time during the specified time period, all documentation evidencing the *periodic* premium payment that was charged by the company for that policy.

7. With respect to each policy that was in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time during the specified time period, all documentation evidencing the *aggregate* amount of premium that was paid to the company for that policy.

8. All financial statements or reports of the company for each year that any of the policies were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany.

9. All reinsurance contracts that were in force during the specified time period and which relate, in whole or in part, to insurance policies issued by the company which policies were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany during the specified time period.

10. All documents evidencing the identity and, if available, the addresses of insurance brokers and brokerage companies involved in the marketing and sale of insurance policies, which policies were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany during the specified time period. Your response to this request may be in the form of lists or data compilations created for the purpose of responding to this subpoena. If it is in that form, the responsive information should be categorized by Country and by City.

11. All broker and brokerage files pertaining to the marketing and sale of insurance policies which policies were in force were in force [sic] in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany during the specified time period.

12. All documents evidencing the identity and, if available, the addresses of insurance agents and agencies involved in the marketing and sale of insurance policies, which policies were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany during the specified time period. Your response to this request may be in the form of lists or data compilations created for the purpose of responding to this subpoena. If it is in that form, the responsive information should be categorized by [Country] and by City.

13. All agent and agency files with respect to the marketing and sale of insurance policies, which policies were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany during the specified time period.

14. All correspondence dated between 1920 and present with policyholders and/or beneficiaries, with respect to policies that were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time within the specified time period. The scope of this request extends to all individual items of correspondence and not merely to form letters or mailings that were sent to policyholders or beneficiaries on an undifferentiated basis.

15. All checks, drafts, and other indicia of payment issued by or on behalf of the company with respect to all policies that were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time during the specified time period.

16. All receipts for or other proof of receipt of payment of policy proceeds with respect to all policies that were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time during the specified time period.

17. All books, records, or other writings documenting the identity of the person or entity to whom or to which payment of policy proceeds was made with respect to all policies that were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time during the specified time period.

18. All records of the company's legal department concerning claims or disputes concerning insurance policies that were in force in Nazi Germany, areas occupied by Nazi Germany, and in countries allied with Nazi Germany at any time during the specified time period, other than such current records that constitute privileged attorney-client communication. For each item concerning

which you claim a privilege, you are to describe it by date, by name and capacity of sender and recipient, and state a general description of its form and subject matter.

19. All written records retention policies, programs or guidelines of the company that have been in force during the period 1920 until present.

20. A list of the names and, if available, the addresses of persons who were in charge of records retention and/or disposal for the company during the period 1920 until present.

21. All billings rendered to the company by outside vendors for services connected with the creation and implementation of programs and mechanisms to locate records, including policies and other evidence of coverage, necessary for the evaluation, processing, handling, and adjusting the insurance claims of policy beneficiaries, Holocaust victims, survivors, and/or their families.

22. All billings rendered to the company by outside vendors for services connected with the creation and implementation of programs and mechanisms for the evaluation, processing, handling, and adjusting insurance claims of policy beneficiaries, Holocaust victims, survivors, and/or their families.

23. All documents including, but not limited to, correspondence, memoranda, instructions, and guidelines issued by or on behalf of the company that pertain to the creation and implementation of programs and mechanisms to locate records necessary for the evaluation, processing, handling, and adjusting the insurance claims of policy beneficiaries, Holocaust victims, survivors, and/or their families.

24. All documents including, but not limited to, correspondence, memoranda, instructions, and guidelines for company employees or agents, that were prepared by or on behalf of the company, to be utilized by such employees or agents, in evaluating, processing, handling, and adjusting the insurance claims of policy beneficiaries, Holocaust victims, survivors, and/or their families.

25. All correspondence, forms, and other documents issued by the company in direct response to insurance claims received from or on behalf of policy beneficiaries, Holocaust victims, survivors, and/or their families. The scope of this request contemplates the production of each item pertaining to each claim, and not merely representative documents.

26. All documents including, but not limited to, correspondence, memoranda, and reports that were prepared by or on behalf of the company and which are directed to any government, governmental agency or entity, or archive, that pertain to the company's mechanisms and efforts to process, handle, or adjust the insurance claims of Holocaust victims, survivors, and/or their families. With respect to each item produced in response to this request, you are also requested to state the specific content of the inquiry that requested your response, or to produce the document that the Company received that triggered a response by it or on its behalf.

Please send all materials responsive to this subpoena to the attention of Luke S. Brown, Esq.

APPENDIX M

626.9543 Holocaust victims. –

(1) SHORT TITLE. – This section may be cited as the "Holocaust Victims Insurance Act."

(2) INTENT; PURPOSE. – It is the Legislature's intent that the potential and actual insurance claims of Holocaust victims and their heirs and beneficiaries be expeditiously identified and properly paid and that Holocaust victims and their families receive appropriate assistance in the filing and payment of their rightful claims.

(3) DEFINITIONS. – For the purpose of this section:

(a) "Department" means the Department of Insurance.

(b) "Holocaust victim" means any person who lost his or her life or property as a result of discriminatory laws, policies, or actions targeted against discrete groups of persons between 1920 and 1945, inclusive, in Nazi Germany, areas occupied by Nazi Germany, or countries allied with Nazi Germany.

(c) "Insurance policy" means, but is not limited to, life insurance, property insurance, or education policies.

(d) "Legal relationship" means any parent, subsidiary, or affiliated company with an insurer doing business in this state.

(e) "Proceeds" means the face or other payout value of policies and annuities plus reasonable interest to date of payments without diminution for wartime or immediate postwar currency devaluation.

(4) ASSISTANCE TO HOLOCAUST VICTIMS. – The department shall establish a toll-free telephone number,

available in appropriate languages, to assist any person seeking to recover proceeds from an insurance policy issued to a Holocaust victim.

(5) PROOF OF A CLAIM. – Any insurer doing business in this state, in receipt of a claim from a Holocaust victim or from a beneficiary, descendant, or heir of a Holocaust victim, shall:

(a) Diligently and expeditiously investigate all such claims.

(b) Allow such claimants to meet a reasonable, not unduly restrictive, standard of proof to substantiate a claim, pursuant to standards established by the department.

(c) Permit claims irrespective of any statute of limitations or notice requirements imposed by any insurance policy issued, provided the claim is submitted within 10 years after the effective date of this section.

(6) STATUTE OF LIMITATIONS. – Notwithstanding any law or agreement among the parties to an insurance policy to the contrary, any action brought by Holocaust victims or by a beneficiary, heir, or a descendant of a Holocaust victim seeking proceeds of an insurance policy issued or in effect between 1920 and 1945, inclusive, shall not be dismissed for failure to comply with the applicable statute of limitations or laches provided the action is commenced within 10 years after the effective date of this section.

(7) REPORTS FROM INSURERS. – Any insurer doing business in this state shall have an affirmative duty to ascertain to the extent possible and report to the department within 90 days after the effective date of this section

and annually thereafter all efforts made and results of such efforts to ascertain:

(a) Any legal relationship with an international insurer that issued an insurance policy to a Holocaust victim between 1920 and 1945, inclusive.

(b) The number and total value of such policies.

(c) Any claim filed by a Holocaust victim, his or her beneficiary, heir, or descendant that has been paid, denied payment, or is pending.

(d) Attempts made by the insurer to locate the beneficiaries of any such policies for which no claim of benefits has been made.

(e) An explanation of any denial or pending payment of a claim to a Holocaust victim, his or her beneficiary, heir, or descendant.

(8) REPORTS TO THE LEGISLATURE. – The department shall report to the Legislature 1 year after the effective date of this section and annually thereafter:

(a) The number of insurers doing business in this state which have a legal relationship with an international insurer that could have issued a policy to a Holocaust victim between 1920 and 1945, inclusive.

(b) A list of all claims paid, denied, or pending to a Holocaust victim, his or her beneficiary, heir, or descendant.

(c) A summary of the length of time for the processing and disposition of a claim by the insurer.

(9) PENALTIES. – In addition to any other penalty provided under this chapter, any insurer or person who violates the provisions of this section is subject to an administrative penalty of $1,000 per day for each day such violation continues.

(10) PRIVATE RIGHT OF ACTION. – An action to recover damages caused by a violation of this section must be commenced within 5 years after the cause of action has accrued. Any person who shall sustain damages by the reason of a violation of this section shall recover threefold the actual damages sustained thereby, as well as costs not exceeding $50,000, and reasonable attorneys' fees. At or before the commencement of any civil action by a party, notice thereof shall be served upon the department.

(11) RULES. – The department, by rule, shall provide for the implementation of the provisions of this section by establishing procedures and related forms for facilitating, monitoring, and verifying compliance with this section and for the establishment of a restitution program for Holocaust victims, survivors, and their heirs and beneficiaries.

(12) SEVERABILITY. – If any provision of this section or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the section which can be given effect without the invalid provision or application, and to this end the provisions of this section are declared severable.

APPENDIX N

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: ASSICURAZIONI GENERALI S.p.A. HOLOCAUST INSURANCE LITIGATION	MDL 1374 M 21-89 (MBM)

MEMORANDUM OF LAW IN SUPPORT OF ASSICURAZIONI GENERALI S.P.A.'S MOTION TO DISMISS, STRIKE, AND/OR FOR JUDGMENT ON ALL PLAINTIFFS' CLAIMS, ON CHOICE OF LAW AND RELATED GROUNDS

* * *

The Ninth Circuit's decision in *Gerling Global Reinsurance Corp. v. Low*, 296 F.3d 832 (9th Cir.), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Nov. 8, 2002) (No. 02-733), is not on point and does not assist Plaintiffs. At issue in *Low* was the constitutionality of the reporting provisions of California's Holocaust Victims Insurance Relief Act ("HVIRA"), Cal. Ins. Code §§ 13800 *et seq.*, which as the court found important, is a separate enactment from the HVIA. In upholding the HVIRA against constitutional challenge, the court took pains to point out that it did not apply California law to foreign insurance contracts, but merely sought information about such policies. *Id.* at 846. The Ninth Circuit sidestepped the import of *Gallagher* by not addressing the constitutionality of the HVIA and expressly reserving judgment on the constitutionality of that statute for another day. *Id.* at 837. Indeed, in distinguishing *Gallagher*, the Ninth Circuit reasoned that, unlike the HVIRA,

the Florida statute, like the HVIA, contained provisions that directly sought to regulate foreign transactions:

> [T]he only statute at issue in this appeal is a reporting statute. Proposed challenges to other laws that alter the statute of limitations and provide a forum for substantive claims were dismissed for lack of standing. By contrast, the statute considered in *Gallagher* contained both disclosure and substantive elements. Although the Eleventh Circuit based its ruling on only the disclosure provisions, the difference in the structure of the two statutes still is meaningful.

Id. at 839. Thus, the Ninth Circuit's decision in *Low* has no application in this case, where *Gallagher* controls.

* * *

CONCLUSION

For the foregoing reasons, Generali respectfully requests that the Court grant its motion and dismiss Plaintiffs' claims in their entirety.

Dated: New York, New York
November 15, 2002

Respectfully submitted,
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Supreme Court, U.S.
FILED
DEC 23 2002
OFFICE OF THE CLERK

No. 02-722

In the Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, AMERICAN RE-INSURANCE COMPANY, *ET AL.*,

Petitioners,

v.

HARRY LOW, IN HIS CAPACITY AS COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

Respondent argues that the HVIRA generates "no conflict" with U.S. foreign policy and claims that "there is no basis for believing that enforcement of the HVIRA will have material adverse foreign policy effects." Opp. 15. The United States government, the Federal Republic of Germany and Switzerland vigorously disagree and have submitted *amicus* briefs urging this Court to grant review and reverse the Ninth Circuit's decisions that the HVIRA is constitutional.

The United States explains how the HVIRA "undermines" its "effective conduct of foreign relations, including its continuing efforts to secure compensation for surviving Holocaust victims." U.S. *Amicus* Br. 8. Germany states that the Ninth Circuit's decisions sustaining the HVIRA are an "affront" to the "sovereignty of the Federal Republic" and "impede the Federal Republic's ability to engage in diplomatic relations with the United States." FRG *Amicus* Br. 2-3. The Swiss government declares that "the HVIRA would compel the violation of Swiss sovereignty and Swiss privacy laws" and "have a significant effect on the foreign relations of the United States with Switzerland." Swiss *Amicus* Br. 3-4.

In the face of these authoritative submissions, the contrary assertions by respondent are completely untenable and serve only to interfere with the "expeditious compensation for Holocaust victims" sought by the United States. U.S. *Amicus* Br. 2. Rather than respect the federal government's exclusive authority in this field. California has established its *own* foreign policy based on its dissatisfaction with the international negotiations on Holocaust-era insurance issues (see, *e.g.*, Opp. 4 n.5). California's actions frustrate American foreign policy — "as the protests from Germany and Switzerland demonstrate," U.S. *Amicus* Br.18 — and subvert the constitutional order established by the Framers for the conduct of our Nation's foreign affairs. see Pet. 12-20.

Further review by this Court is essential to correct the constitutional errors of the Ninth Circuit in upholding the

HVIRA, which have immediate adverse consequences for U.S. foreign policy.

A. The HVIRA Undermines The Federal Government's Exclusive Authority To Conduct Foreign Relations.

1. Respondent's principal argument is that "petitioners present no evidence of *any* tangible effects upon or threats to foreign affairs." Opp. 13. To create the false impression that the HVIRA has no adverse foreign policy consequences, respondent quotes selectively from a footnote in an *amicus* brief filed almost two years ago by the United States urging rehearing *en banc* in the preliminary injunction appeal. *Id.* at 16. This argument is rendered frivolous by the United States' *amicus* brief filed less than two weeks ago, which concludes (at 2) that the HVIRA "interferes with the national government's authority over foreign affairs * * * and with its traditional role in addressing claims arising out of international conflicts * * *."

Respondent's factual assertions similarly miss the mark. Respondent cites, for example (at 16), the decision of the German Parliament in May 2001 to release funds into the German Foundation after finding there is "satisfactory legal peace for German companies" in the United States. The Foundation is a huge fund (approximately $5 billion), and only a small portion of that money (approximately $250 million) is dedicated to insurance claims. The vast majority of the funds are designated as compensation "for Nazi-era slave and forced laborers." *German Industry to Meet Nazi Slave Labor Compensation Pledge Next Month*, AP WORLDSTREAM, July 24, 2001. The HVIRA has nothing to do with slave or forced laborer compensation and did not affect those payments.

Negotiations on Holocaust-era insurance claims, however, have continued. Pet. App. 177a-180a; Pet. 5. While criticizing these delicate international negotiations, Opp. 4 n.5, respondent contends that the HVIRA has had no "material effect on the Foundation, ICHEIC or any other international negotiations," *id.* at 17. Respondent fails to mention that enforcement of the

HVIRA has been stayed for over two years — since before its effective date — as a result of this litigation. The Ninth Circuit has continued the stay pending the disposition of the petition by this Court. The HVIRA thus has not been allowed to obstruct the "extensive international discussions" on Holocaust-era insurance claims, U.S. *Amicus* Br. 2. But the United States and its allies have warned of serious adverse consequences should the HVIRA be enforced. These consequences include undermining ICHEIC as the "exclusive mechanism for resolving Holocaust-era insurance claims" and the achievement of "legal peace" for German companies, *id.* at 4, 17, and trenching on European privacy laws, see FRG *Amicus* Br. 4-5; Swiss *Amicus* Br. 4 — inevitable effects of the HVIRA that directly contradict U.S. "foreign policy interests." U.S. *Amicus* Br.4.

2. The HVIRA is unconstitutional under *Zschernig* v. *Miller*, 389 U.S. 429 (1968). Respondent makes almost no effort to defend the Ninth Circuit's analysis of *Zschernig*, which — as the petition demonstrated (at 14-18) — was little more than a thinly veiled refusal to apply this Court's precedents. There is no doubt, and respondent does not deny, that the HVIRA is a deliberate attempt to alter the resolution of a matter that has been the subject of international negotiations at the highest level. See U.S. *Amicus* Br. 16-18. That is the stated goal of the statute. See Cal. Ins. Code § 13801(f); Pet. 15. As such, it is plainly an interference with the exclusive power of the federal government to conduct foreign affairs.

In *Zschernig*, the federal government submitted an *amicus* brief expressly denying that the state law in question "'unduly interferes with the United States' conduct of foreign relations'" (389 U.S. at 434), but this Court nonetheless found that the law unconstitutionally burdened the foreign affairs power. The Court held that where a state law has a "great potential for disruption or embarrassment" of American foreign policy, it is unconstitutional even where the executive disavows any specific adverse foreign policy effect. The Court noted that where a state statute leads to "minute inquiries concerning the

actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation [regarding legal developments in foreign countries]," it constitutes "forbidden state activity." *Id.* at 435-436.

Here, the "potential" for disruption and embarrassment is far more direct and obvious than it was in *Zschernig*. The California legislature passed the HVIRA in an open and deliberate effort to second-guess and modify the results of complex international negotiations (U.S. *Amicus* Br. 2). The premise of this state legislation — facilitation of litigation — is directly contrary to the negotiated approach taken by federal officials (*id.* at 2-6, 16-18). The law creates a conflict between state obligations and foreign laws, leading foreign nations to complain of the effect on their sovereignty. Finally, and conclusively, both the United States and the affected foreign governments have filed *amicus* briefs explaining that the HVIRA is inconsistent with the premise of important international agreements. See *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 382-386 (2000).

Respondent attempts to distinguish *Zschernig* and other precedents, largely on the ground that "the HVIRA does not insult, criticize or exhibit hostility toward any foreign government." Opp. 17-21. Even if true, this is constitutionally irrelevant. The Constitution treats the national government's authority over foreign relations as "full and exclusive," "entirely free from local interference," *Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941). It is "not shared by the States [but] vested in the national government exclusively," *United States* v. *Pink*, 315 U.S. 203, 233 (1942). Nothing in *Zschernig* or the other decisions suggests that the foreign affairs doctrine is limited to preventing states from "insulting" or "criticizing" foreign governments. Indeed, in *Chy Lung* v. *Freeman*, 92 U.S. 275 (1876), this Court's first decision striking down a state law on foreign affairs grounds, the state action had no reference to foreign governments, but only to foreign subjects. The Court held that the Constitution entrusts "the whole subject" of

"relations" with "foreign nations" to the federal government, and prohibits the states from taking acts with respect to other countries for which the entire Nation might be held responsible. 92 U.S. at 280. That is equally true of the HVIRA.

Respondent's claim that Congress has "implicitly approved state legislation like the HVIRA" (Opp. 18) is totally without foundation. The U.S. Holocaust Assets Commission Act of 1998, Pub. L. 105-186, 112 Stat. 611, on which respondent relies, neither authorizes nor endorses state statutes with the extraterritorial regulatory effect of the HVIRA. The Act called on the Holocaust Assets Commission to encourage the National Association of Insurance Commissioners to provide information, "to the degree the information is available," on insurance companies "doing business in the U.S." (*i.e.*, companies within the jurisdiction of the United States). The Act did not signal the states to embark on their own individual and divergent foreign policies. As the United States has noted, "[n]othing in the Act imposes reporting requirements on insurers under threat of sanctions, confers any new authority on the States to do so, or seeks the sort of private information that may be protected from disclosure under foreign law." U.S. *Amicus* Br. 19-20 n.8.

This Court's decision in *Barclays Bank PLC* v. *Franchise Tax Bd.*, 512 U.S. 298 (1994), provides no support for respondent's position (see Opp. 19-20). That case was decided on Commerce Clause grounds and did not discuss or even mention *Zschernig*, and the state tax scheme at issue was "congressionally condoned." 512 U.S. at 330.

B. The HVIRA Exceeds Due Process Limits On California's Legislative Jurisdiction.

1. Respondent parrots the Ninth Circuit's due process analysis of California's legislative jurisdiction to enact the HVIRA. Respondent characterizes the HVIRA as a mere "reporting statute" that does not "regulate the substance of out-of-state transactions" and is not subject to due process scrutiny. Opp. (Gerling) 18-19.

But as the United States has explained (at 10 (citation omitted), the HVIRA is "impermissible extraterritorial regulation. Its 'practical effect' is to compel 'conduct beyond the boundaries of the State' * * * — specifically, the collection, compilation, and disclosure of information" on insurance transactions entered into more than 50 years ago in Europe, between European parties, to cover European risks. And "[t]here is no nexus between those transactions and the legitimate interests of California." *Ibid.* Yet California has demanded a full accounting of *every* Holocaust-era insurance policy, notwithstanding the complete absence of contacts between California and the policies at issue. This demand exceeds the State's legislative jurisdiction in violation of due process, as this Court has long held. See, *e.g.*, *Home Ins. Co.* v. *Dick*, 281 U.S. 397, 407-410 (1930).

Respondent insists (Opp. (Gerling) 18-22) that the HVIRA does not regulate foreign insurers or foreign insurance transactions. But requiring a person to "disclose, or refrain from disclosing, confidential information is regulatory in nature. It imposes a substantive obligation on that person, the violation of which carries adverse consequences." U.S. *Amicus* Br. 11-12 (citing *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 28 (1990); *BMW of North Am., Inc.* v. *Gore*, 517 U.S. 559, 572-573 (1996)).

Moreover, respondent's revisionist account of the state interests underlying the HVIRA is flatly contradicted by the Act's text, structure and legislative history. Nowhere does the HVIRA even mention licensing standards or the "fitness" of California insurers. No "features of [the] HVIRA suggest that its purpose or primary operative effect is to enable the Commissioner to verify the *bona fides* of insurers doing business in the State." U.S. *Amicus* Br. 12. The "information sought by [the] HVIRA is too remote, too dated, and, at the same time, too detailed to support" the regulatory "purpose" now asserted by respondent. *Id.* at 13; see Pet. 21-22.

Thus, respondent's claim (Opp. (Gerling) 20) that invalidation of the HVIRA would "cripple state regulatory power" is baseless. To the contrary, invalidation of the HVIRA would restore the proper constitutional limits on state regulatory power. Respondent has the constitutionally permissible authority to "gather information to assess the 'fairness and honesty of methods of doing business' of any insurer that seeks to do business in the State." U.S. *Amicus* Br. 13 (citing Cal. Ins. Code §§ 717, 733, 1215.6). These statutes focus on the fitness of California insurers. By contrast, the HVIRA focuses only on "transactions that occurred in Europe during a time of international conflict." U.S. *Amicus* Br. 11.

Rather than supporting a coherent state regulatory regime, respondent's position would upset the orderly regulation of multinational insurers. If California can regulate extraterritorially and demand information from foreign insurers in violation of the laws of the countries in which those insurers are "extensive[ly]" regulated, see FRG *Amicus* Br. 3-5; Swiss *Amicus* Br. 7, the result would be regulatory chaos. "When, as here, a State seeks to project its regulatory regime into the jurisdiction of another Nation, the potential is particularly great for inconsistent legislation and resulting conflict, as well as for interference with United States foreign policy." U.S. *Amicus* Br. 9. The threat is very real, because a number of other states have followed California's lead. See FRG *Amicus* Br. 12-13.

2. Given the HVIRA's purpose and effect, it plainly violates due process, as the Eleventh Circuit concluded in *Gerling Global Reinsurance Corp.* v. *Gallagher*, 267 F.3d 1228 (2001), with respect to a virtually identical Florida statute. As demonstrated in the petition (at 21-23), *Gerling* "cannot be reconciled" with the Ninth Circuit's decision in this case. U.S. *Amicus* Br. 13. In fact, the Ninth Circuit itself acknowledged the "conflict[]" between the two decisions. Pet. App. 11a.

Respondent nonetheless relies on the same purported distinctions drawn by the Ninth Circuit to try to distinguish

Gerling, but none "is persuasive." U.S. *Amicus* Br. 13 n.6; Pet. 21-23. Thus, contrary to respondent's assertion (Opp. (Gerling) 23-24), "the Florida statute, like [the] HVIRA, applies directly only to '[a]ny insurer doing business in th[e] state.'" U.S. *Amicus* Br. 14 n.6 (quoting *Gerling*, 267 F.3d at 1230). Second, like respondent here, Florida tried to defend its statute as regulatory fitness legislation, but the Eleventh Circuit "concluded that the text and structure of the statute did not support that position." U.S. *Amicus* Br. 14 n.6 (citing *Gerling*, 267 F.3d at 1239-1240). Third, just like the Florida statute, the "legislation that enacted the HVIRA * * * contained other provisions to facilitate the litigation of [Holocaust-era insurance] claims." U.S. *Amicus* Br. 14 n.6.

The conflict with *Gerling* is real and highlights the need for resolution of the due process issue, because similar statutes have been enacted or are pending in several other states. FRG *Amicus* Br. 12-13; Pet. 13 n.2.

C. The Ninth Circuit's Erroneous Construction Of The McCarran-Ferguson Act Warrants Review.

Respondent does not deny that the Ninth Circuit's interpretation of the McCarran-Ferguson Act involves an important, recurring issue that threatens to foment tension with the United States' international trading partners. The grounds respondent does advance in arguing against review of this issue are insubstantial.

First, respondent is wrong in asserting (Opp. 23) that "this Court has repeatedly held that the McCarran-Ferguson Act exempts state insurance regulations from *all* Commerce Clause restrictions, even where the regulation has extraterritorial effects." Quite the contrary is true: in *State Bd. of Ins.* v. *Todd Shipyards Corp.*, 370 U.S. 451 (1962), the Court relied on the McCarran-Ferguson Act's legislative history to hold that "the Act was so designed as not to displace" decisions limiting state power to engage in extraterritorial regulation of insurance. 370 U.S. at 455. As this Court explained, the legislative record thus

"indicated without ambiguity that such [extraterritorial] state 'regulation or taxation' should be kept within the limits set by the *Allgeyer*, *St. Louis Cotton Compress*, and *Connecticut General Life Insurance* decisions" (*id.* at 456) — each of which held that states do *not* have authority to regulate the extraterritorial activities of insurance companies. See Pet. 28-29. Indeed, even the dissent in *Todd* read the McCarran-Ferguson Act *itself* to withdraw "from the states the power to tax the ownership and use of insurance policies" when "those policies were made * * * in another State." *Id.* at 458. *Todd* leaves no doubt that the Ninth Circuit misunderstood the scope of the McCarran-Ferguson Act.*

Second, respondent cannot distinguish *Federal Trade Comm'n* v. *Travelers Health Ass'n*, 362 U.S. 293 (1960). Repeating the Ninth Circuit's holding, respondent asserts (at 25-26) that *Travelers* is inapposite because it involved Section 2(b) of the McCarran-Ferguson Act and did not address a Commerce Clause challenge implicating Section 2(a). As demonstrated in the petition (at 25-27) and as the United States explains (U.S. *Amicus* Br. 16-17), however, Sections 2(a) and 2(b) use essentially identical language in describing the relevant body of state legislation, and therefore must have an identical scope. As explained in the petition (at 28-29), the history of the Act confirms that Congress did not mean to preserve extraterritorial state regulation.

Third, respondent is incorrect in arguing (at 28-30) that, even apart from the McCarran-Ferguson Act, the HVIRA does not violate the Commerce Clause. This was not the basis for the Ninth Circuit's decision, which nowhere disputed that the

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* Respondent likewise gets no support from *Western & Southern Life Ins. Co.* v. *State Board of Equalization*, 451 U.S. 648 (1981), cited at Opp. 24. Although the California tax at issue in that case was discriminatory, it was not extraterritorial; it was imposed on insurance companies doing business in California and did not regulate out-of-state commercial activity in any way. See 451 U.S. at 649-650.

HVIRA would be unconstitutional in the absence of the McCarran-Ferguson Act.

Respondent's argument is, in any event, wrong on its own terms. Respondent asserts (at 28) that the HVIRA is "not an extraterritorial law. It applies only to insurers doing business in California, and applies equally to all such insurers." But the "HVIRA is an impermissible extraterritorial regulation," whose "'practical effect' is to 'compel conduct beyond the boundaries of the State.'" U.S. *Amicus* Br. 10 (citing *Healy* v. *Beer Institute*, 491 U.S. 324, 336 (1989)). Extraterritorial regulation is unconstitutional because "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority." *Ibid.* Because it is undeniable that "the practical effect of [the HVIRA] is to control conduct beyond the boundaries of the State" (*ibid.*), California's statute is unconstitutional.

Finally, respondent relies (at 29-30) on *Barclays* in arguing that there is no need for a "uniform national approach" to Holocaust-era insurance issues. But in *Barclays*, the Court "found the reactions of foreign powers and the opinions of the Executive irrelevant in fathoming congressional intent because Congress had taken specific actions rejecting the positions both of foreign governments * * * and the Executive." *Crosby*, 530 U.S. at 385. Here, there is no action of any kind by Congress evidencing such disapproval and "*Crosby* reaffirms the central importance in [that] situation of the President's views in exercising his constitutional responsibility 'to speak for the Nation with one voice in dealing with other governments.'" U.S. *Amicus* Br. 19.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Nos. 02-722 and 02-733

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In The
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Respondent.

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v.

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SUPPLEMENTAL BRIEF

Respondent Harry W. Low, in his capacity as the Commissioner of Insurance of the State of California (the "Commissioner") respectfully submits this supplemental brief in response to the Brief for the United States as Amicus Curiae Supporting Petitioners (Nos. 02-722 and 02-733) (the "U.S. Brief"). Supreme Court Rule 15.8. *See Hagen v. Utah*, 510 U.S. 399, 410 (1994).

I. THE U.S. BRIEF CONFIRMS THAT THE HVIRA POSES NO TANGIBLE THREAT TO U.S. FOREIGN AFFAIRS

Much of petitioners' argument is premised upon dramatic overstatement of the effect of California's Holocaust Victim Insurance Relief Act, Cal. Ins. Code §§ 13800-13807 (the "HVIRA"), upon U.S. foreign affairs. As pointed out in the Commissioner's briefs in opposition, petitioners seek to manufacture a foreign policy crisis out of pure rhetoric, without a single concrete example of how the HVIRA has affected or may affect U.S. foreign affairs. The Commissioner has noted that all of the U.S. diplomatic initiatives mentioned by petitioners (the German Foundation Agreement, the International Commission on Holocaust Era Insurance Claims (ICHEIC) and various other related agreements) are proceeding without any disruption or material threat of disruption from the HVIRA. Brief in Opposition to the AIA Petition (No. 02-722) at 15-17.

The U.S. Brief confirms the HVIRA's lack of foreign policy effects. The U.S. Brief does not identify any tangible harm to foreign affairs that might be posed by the HVIRA (nor do the related amicus briefs of the governments of Switzerland and Germany). At most, the U.S. Brief offers

conclusory and speculative suggestions that the HVIRA "threatens to impair" United States policy, that it "may impede the implementation and operation" of various agreements, and that it is "potentially disruptive and counterproductive." U.S. Brief at 17-18. But the U.S. Brief fails to suggest any way in which the HVIRA has caused, or even may cause, any disruption to the ongoing Holocaust settlement initiatives or any material aspect of U.S. diplomacy.

The only matter beyond mere speculation that the U.S. Brief suggests is that Germany and Switzerland have lodged diplomatic protests against various state laws including the HVIRA. But it is not unusual for state laws affecting foreign private companies to be protested by those companies' home governments, and neither this Court nor any other court has held that such protests alone are constitutionally significant effects upon foreign affairs. *See Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994); *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903 (3rd Cir. 1990).

II. THE U.S. BRIEF MISSTATES THE *BARCLAYS* CASE AND IMPLIES A SWEEPING RULE OF EXCLUSIVE FEDERAL AUTHORITY THAT IS UNSUPPORTED BY LAW

Recognizing that the HVIRA has not impaired any diplomatic initiative and does not criticize any foreign government, the U.S. Brief nonetheless suggests that the HVIRA impermissibly "intrudes" in some vague way short of actual interference into a sphere of exclusive federal authority. As the Commissioner discussed in his Brief in Opposition to the AIA Petition (No. 02-722) (pages 17-18),

under *Zschernig v. Miller*, 389 U.S. 429 (1968), a state intrudes upon the federal government's foreign affairs power if the state criticizes, insults or shows hostility toward a foreign government. But the HVIRA does not do any of these things. The HVIRA is not even directed to foreign governments – it is merely a regulation of the local, private business of insurance in California.

Moreover, state regulation of the business of insurance, even when it involves multinational actors, is not part of a sphere of federal exclusivity. Rather, insurance regulation has long been a usual state activity, as recognized by Congress in the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (2000). As this Court has held, such a traditional state regulatory activity remains appropriate even if it has effects upon foreign private parties. *Barclays*, 512 U.S. at 328-30; *Clark v. Allen*, 331 U.S. 503 (1947). Indeed, the principal difference between *Clark* and *Zschernig* (cases that involved substantially similar statutes) was that the statute struck down in *Zschernig* was being applied in a way that criticized and insulted foreign governments, whereas the statute upheld in *Clark* adversely affected foreign private parties but was not implemented in a way that criticized foreign governments. *See Zschernig*, 389 U.S. at 433-34.

The U.S. Brief suggests that, even apart from *Zschernig*, the fact that U.S. diplomatic activity has occurred or is ongoing with respect to the resolution of Holocaust-era insurance claims is sufficient to oust state regulatory authority that touches in some respect on that subject matter. The U.S. Brief contains no authority for such a limitless claim of federal authority and there is none. No case has ever held that the existence of U.S. diplomatic efforts itself overrides state regulatory authority, and at

least two important cases are squarely to the contrary. In both *Barclays*, 512 U.S. 298 (1994), and *Trojan Technologies*, 916 F.2d 903 (3rd Cir. 1990), the Executive was involved in diplomatic activities relating to the state laws at issue and foreign governments had strongly protested the state activities. Yet the laws in both cases were upheld on the ground that no preemptive act of Congress (or applicable treaty) overrode the state's authority.[1] In any event, the United States has expressly acknowledged here that the German Foundation Agreement is not itself preemptive of laws such as the HVIRA. *See* Resp. App. at 48-49.

The U.S. Brief misstates the importance and effect of the *Barclays* case. The brief argues that the Court of Appeals below erred in relying on *Barclays*, because "*Barclays* addressed an unusual situation in which Congress and the Executive had taken divergent positions." U.S. Brief at 19. However, as the court below pointed out, the positions of the Executive and Congress are no less divergent in the present case. Based on a thorough review of the relevant congressional legislation,[2] the court below concluded that Congress had implicitly approved state

[1] This Court granted certiorari in *Barclays* based on, *inter alia*, dormant Commerce Clause and *Zschernig* challenges to a state statute. This Court decided the case under the dormant Commerce Clause and upheld the statute without mentioning *Zschernig*, thus implicitly rejecting the *Zschernig* challenge. In *Trojan Technologies*, the Third Circuit specifically considered and rejected the *Zschernig* challenge.

[2] In particular, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 and the U.S. Holocaust Assets Commission Act of 1998, Pub. L. 105-186, 112 Stat. 611, as amended Pub. L. 106-155, § 2, 113 Stat. 1740 (1999) (codified at 22 U.S.C. § 1621 note) (2000).

laws such as the HVIRA. Congress plainly has not adopted any legislation opposing such state activities or otherwise indicated any concern about them. In *Barclays*, Congress had not adopted any legislation affirmatively supporting the challenged law; it had simply declined to adopt an Executive branch recommendation to enact legislation restricting the states. This Court held that it would not invalidate the state law, despite its effects on foreign businesses and protests by foreign governments, in the absence of "specific indications of congressional intent to bar the state statute here challenged." *Barclays*, 512 U.S. at 324.[3]

In sum, the U.S. Brief appears to rest upon the unsupported assertion of a sweeping Executive power to override legitimate state regulatory authority through past or current diplomatic activity. Such far-reaching authority would invalidate many state regulatory regimes whose constitutionality has never before been doubted. State regulatory authority, of course, is displaced by actions of Congress, which is the voice of the nation in foreign commerce, *see Barclays*, 512 U.S. at 329-330, and may not overstep the limits established in *Zschernig*, 389 U.S. 429, by criticizing or insulting foreign governments. But the HVIRA does not fall into either of these categories. Accordingly, it is no more constitutionally suspect than the state statute upheld in *Barclays*, which regulated private

[3] In contrast, in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), upon which the U.S. Brief primarily relies, Congress had adopted legislation establishing a national policy that displaced the states. Thus, the "specific indications of congressional intent" from *Barclays* were plain and this Court accordingly invalidated the statute.

business, had been protested more vigorously by foreign governments, and had received less support from Congress than has the HVIRA.

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE ORGANIZATION FOR INTERNATIONAL INVESTMENT FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2(b) of the Rules of this Court, the Chamber of Commerce of the United States (the "Chamber") and the Organization for International Investment ("OFII") move for leave to file the accompanying brief as *amici curiae* in support of the petitions for writs of certiorari. Counsel for

the petitioners have consented to the filing of this brief, but counsel for the respondent has withheld consent.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of more than three million U.S. businesses and organizations of every size, in every business sector, and from every region of the country. Chamber members transact business in all or nearly all of the United States, as well as in a large number of countries around the world. An important function of the Chamber is to advocate its members' interests in matters of national concern before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government.

The Organization for International Investment ("OFII") is the largest business association in the United States representing the interests of U.S. subsidiaries of international companies before all branches and at all levels of government. OFII's member companies employ hundreds of thousands of workers in thousands of plants and locations throughout the United States, as well as in many foreign countries, and are affiliates of companies transacting business in countries around the world.

Both organizations regularly file briefs as *amici curiae* in cases such as this one that raise issues of vital concern to the business community. Together they filed a brief as *amici curiae* in this Court in *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000), an important precursor to the present litigation. In this case, they again seek to assist the Court in exploring the Constitution's limits on the role of the states in the conduct of foreign affairs and foreign commerce.

The Chamber and OFII believe that this petition raises two related issues that are critical to the definition of a state's role in foreign policy and foreign commerce. First, this case provides the Court with an opportunity to resolve important questions about the federal government's exclusive authority over foreign relations—questions left open in *Crosby*. Where the nation's foreign policy is clearly established at the federal level and its implementation by the federal government is ongoing, states may not insert themselves as protagonists on the international stage. *Crosby* unequivocally confirmed this principle in a case where U.S. foreign policy was embodied in an act of Congress, *id.* at 373-74. But *Crosby* did not directly address its applicability in the more common case where foreign policy is set and pursued through diplomatic initiatives undertaken by the Executive.

Second, this case provides the Court with an opportunity to resolve a conflict among the courts of appeal as to whether due process constraints on a state's legislative power prevent it from overreaching in international affairs. As noted, a state's power to act in foreign affairs is limited where such action conflicts with federal powers. But this limitation—on its own—does not fully define the boundaries of state action on the international stage. Under the Constitution, notions of due process also limit the extent to which a state may regulate parties and subject matters that lie beyond its borders. But the courts of appeal are split on the standard that governs these limits on state legislative power.

Chamber and OFII members depend on a stable and predictable framework of international laws and agreements, made possible by United States diplomatic efforts, that allow them to conduct business around the globe. In their view, the decisions below put that framework at risk, by permitting states to legislate beyond their boundaries in a deliberate effort to influence delicate international relations.

The accompanying Chamber and OFII brief offers a broader perspective on the importance of Supreme Court review in this case than that of the petitioners. In their brief, *amici* focus on the consequences of the Ninth Circuit's decisions for U.S. foreign policy-making writ large, as well as for global commerce, whose flows of goods and services

depend on networks of corporate relationships that the decision below puts in jeopardy. The Chamber and OFII believe that this perspective is not only relevant but indeed critical to a full appreciation of the need for review by this Court.

For the foregoing reasons, the motion of the Chamber and OFII for leave to file the accompanying brief as *amici curiae* should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

Nos. 02-722, 02-733

AMERICAN INSURANCE ASSOCIATION *et al.*,
Petitioners,

v.

HARRY LOW, COMMISSIONER OF INSURANCE
FOR THE STATE OF CALIFORNIA,
Respondent.

GERLING GLOBAL REINSURANCE CORP. *et al.*,
Petitioners,

v.

HARRY LOW, COMMISSIONER OF INSURANCE
FOR THE STATE OF CALIFORNIA,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE ORGANIZATION FOR INTERNATIONAL INVESTMENT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Under cover of the accompanying motion pursuant to Rule 37.2(b) of the Rules of this Court, the Chamber of Commerce of the United States and the Organization for International Investment respectfully submit this brief *amici curiae* in

support of Petitioners seeking writs of certiorari to the U.S. Court of Appeals for the Ninth Circuit.[1]

INTERESTS OF THE *AMICI CURIAE*

Amici curiae are business associations that have a substantial interest in ensuring stable and predictable legal regimes affecting international trade and investment.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of more than three million U.S. businesses and organizations of every size, in every business sector, and from every region of the country. While most of the country's largest companies are Chamber members, 96% of its members are small businesses with fewer than 100 employees. Chamber members transact business in all or nearly all of the United States, as well as in a large number of countries around the world. An important function of the Chamber is to advocate its members' interests in matters of national concern before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government.

The Organization for International Investment ("OFII") is the largest business association in the United States representing the interests of U.S. subsidiaries of international companies. OFII's member companies employ hundreds of thousands of workers in thousands of plants and locations throughout the United States, as well as in many foreign countries, and are affiliates of companies transacting business in countries around the world.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Further, no counsel for any Petitioner or Respondent authored this brief in whole or in part.

Amici view the state legislation at issue in this case as a threat to their members' interests in a stable legal environment for business and investment, and as a significant hindrance to the foreign commerce on which their members, and the U.S. economy, depend.

SUMMARY OF THE ARGUMENT

The American Insurance Association *et al.* and Gerling Global Reinsurance Corp. *et al.* have petitioned for writs of certiorari to the U.S. Court of Appeals for the Ninth Circuit on the grounds that that court's decisions in *Gerling Global Reinsurance Corp. of America* v. *Low*, 296 F.3d 832 (9th Cir. 2002) and 240 F.3d 739 (9th Cir. 2001), *cert. withdrawn*, 534 U.S. 1120 (2002), clearly conflict with precedents of this Court and other courts of appeal regarding the exclusive foreign affairs powers of the federal government and the limits on a state's power to regulate beyond its borders. *Amici* agree and urge the Court to grant the petitions.

Amici are gravely concerned that California has enacted legislation that implements its own foreign policy agenda, with serious consequences for foreign commerce and for the nation's foreign policy. Specifically, California has enacted an insurance regulation that has impaired U.S. foreign policy negotiations and that continues to threaten a delicate international settlement. Officials of the U.S. government have confirmed repeatedly that the Holocaust Victim Insurance Relief Act of 1999, Cal. Ins. Code §§ 13800-13807 ("HVIRA")—which requires foreign insurance companies to provide information about foreign insurance policies issued abroad half a century ago, on pain of their California affiliates' exclusion from business in that state—has directly interfered with federal foreign policy promoting a global settlement of Holocaust-era claims. See Petition for a Writ of Certiorari at 8-12, *American Ins. Ass'n* v. *Low*, No. 02-722 (U.S. filed Nov. 7, 2002) ("Pet. 02-722").

This case requires the Court's intervention on two important federal questions. First, this case squarely presents a substantial and important question left unresolved in the Court's recent decision in *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000). There can be no doubt that a federal statute or treaty preempts a state statute on the same subject. See *id.* at 373-74. Yet, in the field of foreign affairs, where Congress rarely speaks directly and the President often acts through international negotiations and executive agreements, a question remains: is national foreign policy the exclusive province of the federal government even in those instances where that foreign policy is not embodied in a statute or treaty?

Second, this case presents an important question concerning the scope of a state's legislative power: to what extent may a state legislature seek to regulate parties or subject matters that lie beyond that state's territory or, as here, lie outside the United States? Statutes like HVIRA threaten cross-border corporate relationships by using U.S. corporate affiliations as a pressure point to extend a state's regulatory reach far beyond its borders, offering foreign and out-of-state businesses a lose-lose choice between, on the one hand, isolation and loss of competitiveness, and, on the other, affiliations that potentially subject them to the regulatory power of every one of our fifty state legislatures. Two courts of appeal have reached opposite answers to this question.

ARGUMENT

HVIRA INTERFERES WITH FOREIGN POLICY AND DISRUPTS FOREIGN COMMERCE.

Resolution of this case will answer two important federal questions: First, in those instances where national foreign policy is not embodied in a statute or treaty, is a state statute that interferes with that foreign policy prohibited, just as

surely as if Congress had acted? Second, to what extent may a state seek to regulate parties or subject matters that lie beyond its borders or, as here, lie beyond the borders of the United States?

In this case, the federal government has acted not through statute or treaty, but through the negotiation and formation by executive agreement of two international organizations to resolve Holocaust-era insurance claims: the Remembrance, Responsibility, and the Future Foundation ("Foundation") and the International Commission on Holocaust Era Insurance Claims ("ICHEIC"). The United States also negotiated the Swiss-U.S. Joint Agreement with an "Action Plan" for future settlement. These federal foreign policy initiatives—and the United States' relations with Germany and Switzerland—are threatened by California's interference. Likewise, California's actions pose serious and immediate risks to U.S. and foreign companies and to foreign commerce itself.

In this brief, *amici* wish to focus particular attention on the diplomatic, business, and economic implications of allowing HVIRA to stand.

A. Impact On The Conduct Of Foreign Affairs

Statutes like HVIRA have a corrosive effect on the conduct of foreign relations. United States diplomats and foreign policymakers will find that their ability to calibrate the mix of carrots and sticks at the international bargaining table has been abrogated by state action. National concerns will remain unresolved and the effects of such state actions will be felt far beyond the state's borders.

California deliberately chose to insert itself into delicate, U.S.-led international negotiations. The statute has the stated aim of "encourag[ing] the development of a resolution to these issues through the international process *or through direct action by the State of California, as necessary*." Cal. Ins. Code § 13801(f) (emphasis added). The very purpose of the statute is to make California's considerable weight felt

directly in the international negotiating arena, and in the implementation process that has since followed. Foreign governments and businesses would disregard California at their peril; its economy produces enough goods and services to be ranked among the top ten economies of the world.

California has ignored HVIRA's debilitating effects on the United States' international initiatives. As early as November 1999, then-Deputy Treasury Secretary Stuart Eizenstat wrote directly to California Governor Gray Davis and then-Insurance Commissioner Quackenbush stating that "actions by California, pursuant to this law, have already potentially damaged and could de[r]ail both a settlement of forced and slave labor negotiations and the progress already achieved by the International Commission on Holocaust Era Insurance Claims."[2] The United States has maintained the position ever since, in public statements and in this litigation, that HVIRA is hindering the nation's foreign policy interests.

By ignoring these pleas and imposing HVIRA's extensive regulatory burdens, California weakened U.S. diplomatic leverage in securing the international agreements settling the insurance claims. In reaching the international settlements, the U.S. emphasized its commitment to help obtain "legal peace" for foreign companies, stating that "it is in the enduring and high interest of the United States to support efforts to achieve dismissal of all National Socialist and World War II era cases against German companies."[3] When the United States and Germany signed the Foundation Agreement in July 2000, some insurance and other companies

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[2] Letter from Eizenstat, Deputy Treasury Secretary, to Davis, Governor (Nov. 30, 1999), *reproduced at* Pet. 02-722 app. 124a.

[3] Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Concerning the Foundation "Remembrance, Responsibility and the Future," July 17, 2000, Annex B (Elements of U.S. Government Statement of Interest), 39 I.L.M. 1298, 1303-04.

funding the Foundation initially were hesitant to fulfill their large monetary obligations in light of the threats to legal peace from laws such as HVIRA and the suits that they spawn.[4] Those threats undermine the very goal of the executive agreements—the settlement of long overdue claims in a single, orderly international process.

HVIRA weakens national foreign policy, compromises the government's ability to conduct international negotiations, and makes it virtually impossible for the United States to fulfill its promises once international agreements are completed. By shouting down the federal government's single voice within the international community, HVIRA has caused more than just difficulty and embarrassment for the U.S. government abroad. HVIRA has threatened a global settlement that would benefit thousands of victims outside of California, for whom the global settlement is likely to be the only remedy.

This Court recently confirmed that federal legislation on foreign affairs preempts state legislation in the same area. *Crosby*, 530 U.S. at 373-74. But state interference with foreign affairs is not immunized simply because a federal foreign policy has not been formally codified by Congress.

The Constitution entrusts the nation's diplomatic and foreign economic relations exclusively to Congress and the President because, as national foreign policymakers, they are in a unique position to take into account all of the measures needed to advance the nation's interests as a whole. The absence of a federal statute or treaty does not imply the absence of a federal foreign policy, or the myriad calculations that go into formulating the nation's foreign policy. Rather, international agreements and negotiations are evidence that national foreign policymakers are carefully balancing the nation's competing interests, as surely as if a federal statute

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[4] *See, e.g.*, Henry Weinstein, *Holocaust Survivors Settlement Hits Snag*, L.A. Times, Mar. 10, 2001, at A15.

were enacted or a treaty signed. State statutes that interfere with national foreign policy upset this balance, potentially frustrating diplomatic efforts to settle the issue at hand.

Moreover, this Court has been clear that foreign policy is by no means the exclusive province of the legislature: "'the President ... possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs.'" *Barclays Bank PLC* v. *Franchise Tax Bd.*, 512 U.S. 298, 329 (1994). As this Court noted in *Zschernig* v. *Miller*, 389 U.S. 429 (1968), "even in absence of a treaty, a State's policy may disturb foreign relations." *Id.* at 441. Under international law, an executive agreement invokes the international responsibility of the United States to the same degree as a treaty. Internationally binding executive agreements like those concluded by the United States with Germany and Switzerland deserve and require the same shield from state-level intrusions that treaties and statutes enjoy.

Zschernig remains the law of the land, and neatly articulates the need for plenary federal authority over foreign affairs. The Ninth Circuit's denigration of the *Zschernig* decision because of its age does nothing to undermine that holding's binding force.[5] And though this Court's decision in *Crosby* did not directly reach the federal foreign affairs or foreign commerce powers, it neither criticized nor called into question the First Circuit's holding on either ground in *National Foreign Trade Council* v. *Natsios*, 181 F.3d 38 (1st

[5] Courts routinely apply *Zschernig* to determine whether a state law impermissibly intrudes on the federal government's foreign affairs power. *See Miami Light Project* v. *Miami-Dade County*, 97 F. Supp. 2d 1174, 1178-79 (S.D. Fla. 2000) (invoking *Zschernig*, and finding Miami-Dade Resolution unconstitutional on preemption grounds). *Cf. North Am. Salt Co.* v. *Ohio Dep't of Transp.*, 701 N.E.2d 454, 462 (Ohio Ct. App. 1997) (applying *Zschernig* analysis); *Mukaddam* v. *Permanent Mission of Saudi Arabia to the United Nations*, 111 F. Supp. 2d 457, 472-73 (S.D.N.Y. 2000) (same).

Cir. 1999).[6] These decisions emphasize the well-founded concern that individual state actions will disrupt federal foreign policy.

This concern is not new—it extends back to the founding of this nation. Alexander Hamilton, in warning of the dangers of individual state foreign policies, identified the same dynamic: "[T]he peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members."[7] This is just the type of case that spurred Hamilton's concern. Today's rapid pace of globalization only makes those concerns more pressing. As the First Circuit noted, "in an increasingly interdependent and multilateral world, [the] affirmation of the foreign affairs power of the national government may be all the more significant." *Natsios*, 181 F.3d at 58 n.14.

Where, as here, state action conflicts with the express policy of the federal government, as evidenced by formal international negotiations and even signed executive agreements, that state law must be struck down just as if it were in conflict with a federal statute. Any other result would expose the foreign relations of this nation to the prospect of repeated and destructive intrusions by state initiatives unless Congress has acted—a construction for which there is no justification in the area of foreign affairs. The Court should

[6] The Ninth Circuit's decision conflicts with the First Circuit's holdings in *Natsios*. Although this Court affirmed the First Circuit's decision on preemption grounds alone, it did not disturb the First Circuit's holding that the Massachusetts procurement law unconstitutionally interfered with the federal government's foreign affairs and foreign commerce powers. Within the First Circuit, then, a state law interfering with foreign policy and regulating commerce in foreign countries violates the federal government's exclusive power over foreign affairs; in the Ninth Circuit, apparently, it does not.

[7] *The Federalist No. 80*, at 535-36 (A. Hamilton) (J. Cooke ed. 1961) (emphasis in original).

hear this case in order to clarify this point, which it left unarticulated in *Crosby*.

The Court should also hear this case in order to resolve a conflict between courts of appeal with regard to states' power to interfere in foreign affairs through the regulation of foreign parties and foreign transactions. The Constitution's framework ensures federal control over the conduct of foreign affairs not only through its exclusive grant of foreign policy-making authority to the federal government, but also through the independent limitations that it sets on state regulatory power. The Due Process Clause requires that the extent of a state's regulatory authority must coincide with—and must not exceed—the extent of that state's legitimate interests. A state does not have the power to regulate a foreign (or domestic) subject if that subject does not have at least "minimum contacts" with the state.[8] Such baseline limitations on a state's legislative power help to prevent state interference in foreign affairs and foreign commerce.

In an international business environment characterized by complex business affiliations that often cross state and

[8] The Eleventh and the Fourth Circuits recently confirmed that the extent of a state's legislative jurisdiction is determined largely by a "minimum contacts" analysis that is similar to the analysis in personal jurisdiction and choice-of-law questions. *See Gerling Global Reins. Corp. of Am.* v. *Gallagher*, 267 F.3d 1228, 1235 (11th Cir. 2001) ("To determine legislative jurisdiction ... we look to choice-of-law and personal jurisdiction analyses.... Applying these standards to the question before us now, we ask whether sufficient contacts exist between the Plaintiffs and the County ... such that it would not be fundamentally unfair to subject the Plaintiffs to the County's registration requirements."). *See also American Charities for Reasonable Fundraising Regulation, Inc.* v. *Pinellas County*, 221 F.3d 1211, 1216 (11th Cir. 2000); *Adventure Communications, Inc.* v. *Kentucky Registry of Election Fin.*, 191 F.3d 429, 435-37 (4th Cir. 1999). The Ninth Circuit's decision below diverged from the "minimum contacts" approach taken by the Eleventh and the Fourth Circuits, both in its articulation of the relevant legal standard and in its application of this standard to the facts.

national boundaries, it becomes especially important to respect those limitations. To permit state regulatory power to extend across vast networks of foreign companies in foreign countries—merely because a single network affiliate does business in California—ultimately threatens federal control over foreign affairs and foreign commerce. Yet the Ninth Circuit decision endorses exactly this result. On the other hand, the Eleventh Circuit, considering a Florida statute nearly identical to HVIRA last year, rejected that result on the grounds that it would amount to the exercise of legislative power by a U.S. state over "insurance transactions involving Plaintiffs' German affiliates that took place years ago in Germany, among German residents, under German law, relating to persons, property, and events in Germany." *Gerling Global Reins. Corp. of Am.* v. *Gallagher*, 267 F.3d 1228, 1238 (11th Cir. 2001). This Court's review is needed to reconcile this conflict between the Ninth and Eleventh Circuits, and to define the limits of state legislative authority.

B. Impact On Companies And Foreign Commerce

HVIRA's impact is not limited to the foreign policy arena. At a very practical level, California has jeopardized U.S. and foreign companies, as well as the interstate and foreign commerce in which they engage.

HVIRA requires insurance companies operating in the state to file detailed reports regarding policies sold to persons in Europe between 1920 and 1945. Cal. Ins. Code § 13804(a). The Act's reporting requirement extends to companies that never issued policies in Europe during this period, but are only "related" to those that actually issued policies. The statutory definition of a "related company" is stunningly broad, encompassing "any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer" that is part of the same corporate structure. *Id.* § 13802(b). The reporting requirements thus apply to insurance companies operating in California whether or not they exercise any control over their foreign partners.

If HVIRA is upheld, those companies unable to comply with HVIRA's stringent requirements face suspension of their licenses to do business in California. This severe sanction means immediate loss of revenue, as well as injury to a company's reputation, resulting in loss of market share. It also threatens considerable disruption to California policyholders, who may suddenly find themselves without valid insurance coverage.

The Ninth Circuit suggests that, if an insurance company is unable either to obtain the required documents from its foreign partners or to send its own employees overseas to inspect these documents, it still can avoid sanctions if it chooses to "disaffiliate and thus shed any reporting requirement," *Low*, 296 F.3d at 840. But today disaffiliation is not a viable option. Companies depend on complex, far-flung networks of corporate partners to remain competitive in the global marketplace. An insurance company that disaffiliates from its European partners likely faces the same consequences as a company that loses its license in California—loss of revenue, damage to its reputation, and a decrease in market share. An insurance company should not be forced to choose between losing its license in California and losing its affiliates in Europe.

HVIRA creates equally serious difficulties for foreign insurers. California's act requires foreign insurance companies to compile the same massive reports even if the company's only connection to California is through an affiliate or subsidiary. Put another way, it requires action by foreign insurance companies, over whom California has no jurisdiction, in connection with business transacted outside California as many as 80 years ago with persons having no nexus to California, on pain of regulatory harm to "related" California insurers. These foreign insurance companies never "purposefully availed" themselves of the California legal system and certainly could not have foreseen that their past activities in Europe might subject them to the authority of the

California legislature.[9] In addition, HVIRA ignores privacy laws that bind these foreign insurers in their own countries. It thereby forces these foreign companies to choose between violating their own domestic privacy laws or sacrificing an affiliate's business in California. To subject these foreign companies to California's legislative authority—solely due to an "abstract, indirect, and unaimed level of involvement" in the state, *American Charities for Reasonable Fundraising Regulation, Inc.* v. *Pinellas County*, 221 F.3d 1211, 1217 (11th Cir. 2000)—is fundamentally unfair and conflicts with the jurisprudence in other courts of appeal.

Enforcement of HVIRA would disrupt not only the affairs of individual companies, but also foreign commerce generally in several ways. Most directly, its enforcement would impose serious economic consequences on the insurance industry, the effects of which would be felt well beyond California's borders. More broadly, it threatens to destabilize the international business partnerships that have become a key mechanism for modern foreign commerce. HVIRA uses U.S. affiliates of foreign companies as a pressure point for regulating conduct far beyond its borders or its jurisdictional authority. That approach is impermissible under both the Commerce Clause and the Due Process Clause of the Constitution, and it is particularly troublesome in a globalizing economy.

The widespread suspension of certificates that HVIRA promises would generate uncertainty and confusion among policyholders, many of whom would be left scrambling for new coverage. The consequences of suspending the certificates would not be limited to California. The disruption of insurance coverage in the state would radiate outward, as

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[9] *See, e.g.*, *American Charities*, 221 F.3d at 1216 ("the regulated party must have performed some act by which it purposefully avails itself of the privilege of conducting activities within the [relevant jurisdiction]") (internal quotation marks omitted).

businesses and individuals in other states and countries react. Insurance companies suffering losses in one state might be forced to increase premiums elsewhere, affecting not only insured individuals but insured companies as well. A California import-export company insured by an affected insurance company, for example, might be forced to restrict its operations, affecting suppliers and customers in other states and countries. Furthermore, due to the accelerating pace of mergers and consolidations in the financial services industry, the disruption will extend even farther than it would have a few years ago.

These consequences are exacerbated by the proliferation of similar statutes. If HVIRA's extraterritorial reach is not reined in, it is likely that other states will continue to follow suit—potentially multiplying HVIRA's impact on foreign commerce tens of times over.[10] And if the HVIRA model stands, states may choose to adapt it to any number of other politically popular issues that tempt them to engage in regulation beyond their borders.

Even more disturbing than the immediate economic consequences of overreaching statutes like HVIRA is their effect on multinational corporate affiliations, an indispensable mechanism in foreign commerce. By seeking to regulate matters outside the state, HVIRA injects uncertainty into existing relationships between foreign and U.S. companies. State laws that try to control commerce overseas through regulation of local affiliates jeopardize the ability of U.S. companies to form critical international alliances, since potential foreign partners will legitimately fear being subjected to heavy reporting requirements and regulatory

[10] Other states have already passed statutes that mirror HVIRA. Md. Code Ann., Ins. §§ 28-101 to 28-110; Minn. Stat. § 60A.053; N.Y. Ins. Law §§ 2701-2711; Tex. Ins. Code Ann. § 21.74; Wash. Rev. Code § 48.104.010. As noted, Florida's near-identical statute, Fla. Stat. ch. 626.9543, was struck down in *Gallagher*, 267 F.3d at 1240.

scrutiny by U.S. states in which they do no business. For foreign companies, laws like HVIRA present the very real possibility that their U.S. affiliates will become unwilling conduits for intrusive state regulations. Foreign companies considering joint ventures with or acquisitions of U.S. companies may reconsider if individual U.S. states are free to reach across their borders—indeed across national borders—and regulate the affairs of foreign companies through their U.S. partners.

State foreign policy regulations can also have the effect of undermining U.S. competitiveness as a result of the desire of individual states to regulate corporate conduct abroad. There is a danger that foreign countries will retaliate against U.S. companies generally for the actions of a few individual states. This Court has recognized the danger of foreign countries retaliating against "the Nation as a whole" for the actions of individual U.S. states. *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 450 (1979). This risk of retaliation is borne by companies and individuals throughout the United States, most of which will lack access to the local California political process that initiated the dispute and without the political means to ameliorate the conflict. Out-of-state concerns and complaints typically fall on deaf ears, as California political actors have no incentive to pay heed to those who are not constituents. Yet California's deafness to national and international concerns puts companies nationwide at risk of retaliation.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully ask this Court to grant the petitions for writs of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, ET AL.,
PETITIONERS

v.

HARRY LOW, INSURANCE COMMISSIONER,
STATE OF CALIFORNIA

GERLING GLOBAL REINSURANCE CORP. OF AMERICA,
ET AL., PETITIONERS

v.

HARRY W. LOW, INSURANCE COMMISSIONER,
STATE OF CALIFORNIA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a California statute that requires an insurance company doing business in the State to disclose information about each insurance policy issued by that company or an affiliate in Europe between 1920 and 1945 (1) violates the Commerce Clause, (2) violates the Due Process Clause, or (3) impermissibly interferes with the national government's exclusive power over foreign affairs.

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In the Supreme Court of the United States

No. 02-722

AMERICAN INSURANCE ASSOCIATION, ET AL., PETITIONERS

v.

HARRY LOW, INSURANCE COMMISSIONER, STATE OF CALIFORNIA

No. 02-733

GERLING GLOBAL REINSURANCE CORP. OF AMERICA, ET AL., PETITIONERS

v.

HARRY W. LOW, INSURANCE COMMISSIONER, STATE OF CALIFORNIA

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INTEREST OF THE UNITED STATES

The United States has engaged in extensive diplomatic efforts to assure that the Nations and enterprises responsible for the Holocaust provide some measure of compensation to their victims. In so doing, the United States has

consistently emphasized the desirability of voluntary, non-adversarial compensation mechanisms.

California has adopted a different approach—one that interferes with the national government's diplomatic efforts. The state statute at issue here, which is expressly addressed to transactions in Europe between 1920 and 1945, interferes with the national government's authority over foreign affairs is general, and with its traditional role in addressing claims arising out of international conflicts, in particular. After a petition for certiorari was filed at an interlocutory stage of this case, this Court invited the Solicitor General to express the views of the United States. *American Ins. Ass'n* v. *Low*, 534 U.S. 1120 (2002).[1] In light of the Court's prior invitation, and the court of appeals' subsequent entry of final judgment, the United States submits this brief *amicus curiae*.

STATEMENT

1. a. Since the end of World War II, the United States has committed substantial diplomatic resources toward achieving compensation for the victims of Nazism. The United States and its allies entered into treaties with the post-War governments of Germany and Austria that required them to provide compensation to such persons. See 02-722 Pet. App. (Pet. App.) 97a-98a. More recently, the United States has engaged in extensive international discussions concerning claims arising out of the Holocaust. As a result of those discussions, the United States has entered into executive agreements with Germany and Austria and has issued a joint statement with Switzerland.

With respect to insurance claims, the United States has sought expeditious compensation for Holocaust victims in accordance with the procedures established by the International Commission on Holocaust Era Insurance Claims (ICHEIC). ICHEIC is a voluntary organization formed by five European insurance companies (including petitioners Generali and Winterthur), the State of Israel, Jewish organizations, and the National Association of Insurance Commissioners.[2] It is chaired by former Secretary of State Lawrence S. Eagleburger. Through ICHEIC, Holocaust victims' insurance claims are processed and checked against European insurers' records in a manner consistent with European data protection laws. The State Department has stated that ICHEIC "should be recognized as the exclusive remedy for all insurance claims that date to the Nazi era" and has "encourag[ed] all insurance companies that wrote policies during the Nazi era to join the ICHEIC." Office of the Spokesman, U.S. Dep't of State, *International Commission on Holocaust Era Insurance Claims Begins Worldwide Effort to Identify Unpaid Claims* (Feb. 15, 2000); see Pet. App. 177a (statement of Ambassador Randolph M. Bell, Special Envoy for Holocaust Issues).

b. The United States' approach to the resolution of Holocaust victims' compensation claims, including insurance claims, is embodied in the executive agreement entered into between the United States and Germany two years ago. See Pet. App. 153a-168a. That agreement recognizes the creation of a foundation in Germany, funded with some $5 billion from public and private sources, to address Holocaust-era claims against German companies that were not addressed by earlier compensation laws. The German government agreed to supervise the activities of the foundation and to assure that the foundation publicizes its existence. *Id.* at 155a-156a (Art. 1, ¶¶ 2, 3). It also agreed that all claims by or on behalf of Holocaust victims against German insurance

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[1] Before the United States responded to the Court's invitation, the district court, on remand, entered final judgment in the case, and the petition was dismissed under this Court's Rule 46.

[2] The United States has observer status in ICHEIC. Several European countries, including Germany, France, Italy, Poland, and the Czech Republic, have observer status as well.

companies would be processed by those companies and the German Insurance Association based on ICHEIC procedures and additional procedures that may be agreed to among ICHEIC, the foundation, and the German Insurance Association. *Id.* at 156a (Art. 1, ¶ 4).

The United States, in turn, agreed to inform its courts that "it would be in [its] foreign policy interests * * * for the Foundation to be the exclusive remedy and forum for resolving [Holocaust-era] claims asserted against German companies." Pet. App. 156a (Art. 2, ¶ 1). The United States also agreed to "use its best efforts" with state and local governments to achieve an "all-embracing and enduring legal peace" with respect to such claims. *Ibid.* (Art. 2, ¶ 2).[3]

2. The State of California has taken a different approach to assuring compensation for Holocaust victims and their families, both in the statute at issue here, the Holocaust Victim Insurance Relief Act of 1999 (HVIRA), Cal. Ins. Code §§ 13800 *et seq.*, and several closely related statutes.

HVIRA requires the Commissioner of Insurance to establish a Holocaust Era Insurance Registry containing detailed information on insurance policies issued to Holocaust victims without regard to whether those victims ever lived in California. Cal. Ins. Code § 13803. The public is to have access to the Registry. *Ibid.* In order to obtain information for the

[3] The executive agreement between the United States and Austria, which consists of an exchange of diplomatic notes and annexes, contains nearly identical undertakings. See *Exchange of Notes* Annex A, ¶ 14 (Jan. 23, 2001) <http://www.usembassy.at/en/policy/annexa.htm>. The joint statement of the United States and Switzerland similarly endorses ICHEIC and notes the "potentially disruptive and counterproductive effects of investigative initiatives or the threat or actual use of sanctions on a sub-federal level against insurers, including those that are * * * participants in [ICHEIC]." *Joint Statement Between the Government of the United States of America and the Government of the Swiss Confederation* (Jan. 29, 2000) <http://www.us-embassy.ch/NEWS/jointstatement.htm>.

Registry, HVIRA requires all insurers doing business in California to disclose information concerning "life, property, liability, health, annuities, dowry, educational, or casualty insurance policies," that were sold, "directly or through a related company, to persons in Europe, which were in effect between 1920 and 1945." *Id.* § 13804(a). The disclosure obligation applies "whether the sale occurred before or after the insurer and the related company became related." *Ibid.* The information that an insurer must disclose includes "[t]he holder, beneficiary, and current status" of each policy, "[t]he city of origin, domicile, or address for each policyholder," and whether and how the policy proceeds have been paid. *Ibid.* The Commissioner must suspend the license of any insurer that fails to provide the information. *Id.* § 13806.

HVIRA declares that its requirements are "necessary to protect the claims and interests of California residents," including some 5600 Holocaust survivors living in the State, and "to encourage the development of a resolution to these issues through the international process or through direct action by the State." Cal. Ins. Code § 13801.

HVIRA is part of a statutory scheme designed to give California a central role in resolving Holocaust-era claims.[4] Another statute authorizes the Commissioner to suspend the license of an insurer upon finding that it, or any affiliate, failed to pay "any valid claim" on a policy issued to a person, whether or not a resident of the State, who was "a victim of persecution of Jewish and other peoples preceding and during World War II by Germany, its allies, or sympathizers." Cal. Ins. Code § 790.15(a) and (b)(1). It defines a "valid claim" to include claims not paid because the records were lost or the policies were confiscated by the Nazis. *Id.* § 790.15(b)(3).

[4] See Assembly Bill No. 600 (Pet. App. 115a-122a) (noting interrelationship of HVIRA, the license-suspension provisions, Cal. Ins. Code § 790.15, and the jurisdictional provisions, Cal. Civ. Pro. Code § 354.5).

A third statute grants state courts venue and jurisdiction over such claims, and abolishes any statute-of-limitations defense if the claim is brought by December 31, 2010. Cal. Civ. Pro. Code § 354.5(b) and (c). It further provides that suits brought on these policies in California courts are "subject to California law" and that forum-selection provisions in the policies are unenforceable. 1998 Cal. Stat. ch. 43, § 2.

3. a. Petitioners, insurers that do business in California and that have European affiliates, brought suit against the Commissioner to challenge the constitutionality of HVIRA. The district court entered a preliminary injunction against the enforcement of the statute. The court held that petitioners had shown a probability of success on the merits of their claims that HVIRA impermissibly "interferes with the national government's exclusive power over external affairs," Pet. App. 95a-105a, and regulates extraterritorially in violation of the Commerce Clause, *id.* at 105a-110a.

b. The court of appeals rejected each of the constitutional grounds on which the preliminary injunction was based. Pet. App. 34a- 60a.

The court of appeals held that HVIRA, as an insurance regulation, is exempted from Commerce Clause scrutiny by the McCarran-Ferguson Act, 15 U.S.C. 1012(a). See Pet. App. 41a-45a. The court also suggested that HVIRA does not, in any event, regulate extraterritorially. The court reasoned that HVIRA "does not regulate the decision making authority of European insurance companies to pay or not to pay claims on European policies," but instead "requires California companies only to *provide information* about" such policies. *Id.* at 43a.

The court of appeals also held that HVIRA does not impermissibly interfere with the national government's authority over foreign affairs. Pet. App. 58a-59a. The court suggested that such interference could not appropriately be found because petitioners had made a "facial" challenge to

HVIRA, because HVIRA "mainly involve[s] foreign commerce," and because HVIRA is "not directed at a particular country." *Ibid.* The court remanded the case for consideration of petitioners' due process claim.

4. a. On remand, the district court permanently enjoined the enforcement of HVIRA. The court held that HVIRA violates the Due Process Clause by suspending insurers' licenses for not making the required disclosures, without enabling them to raise defenses such as a foreign law prohibition against disclosure. Pet. App. 78a-83a.

b. The court of appeals reversed. Pet. App. 1a-33a.

The court of appeals held that HVIRA does not violate due process constraints on California's legislative jurisdiction because HVIRA merely regulates the insurance industry within California. Pet. App. 9a. The court expressly declined to follow *Gerling Global Reinsurance Corp.* v. *Gallagher*, 267 F.3d 1228 (11th Cir. 2001), which invalidated a similar statute on due process grounds because of its extraterritorial reach. Pet. App. 9a-11a.

In addition, the court of appeals held that HVIRA does not violate due process by denying insurers an opportunity to defend against the suspension of their licenses. Pet. App. 20a-29a. The court also reiterated its earlier holdings sustaining HVIRA under the Commerce Clause and the foreign affairs power. *Id.* at 29a.

ARGUMENT

The court of appeals, in upholding a California statute that requires insurers doing business in the State to make sweeping disclosures about transactions that occurred exclusively in Europe between European parties, disregarded constitutional constraints on a State's authority to regulate extraterritorially and to inject itself into matters of foreign relations reserved to the President and Congress. The court of appeals' decision is inconsistent with this Court's decisions articulating those constraints under the Commerce Clause,

the Due Process Clause, and the foreign affairs power of the national government, and is in direct conflict with the Eleventh Circuit's recent decision invalidating a similar statute on due process grounds. In addition, the court of appeals' decision undermines the United States' effective conduct of foreign relations, including its continuing efforts to secure compensation for surviving Holocaust victims within their lifetimes. For these reasons, the petitions for a writ of certiorari should be granted.

I. HVIRA VIOLATES CONSTITUTIONAL PROHIBITIONS ON EXTRATERRITORIAL STATE REGULATION

Both the Commerce Clause and the Due Process Clause of the Fourteenth Amendment prohibit a State from regulating activity outside its borders. HVIRA is such an extraterritorial regulation because it focuses exclusively on transactions in Europe before and during World War II and compels the disclosure of information about those transactions although they have "no jurisdictionally-significant relationship to [the State]." *Gerling Global Reinsurance Corp.* v. *Gallagher*, 267 F.3d 1228, 1238 (11th Cir. 2001).

A. The Commerce Clause And The Due Process Clause Prohibit States From Regulating Transactions Outside Their Borders

1. Under familiar Commerce Clause principles, California may not require corporations to adhere to its standards in other States or Nations as a condition of doing business in California. See, *e.g.*, *BMW of N. America, Inc.* v. *Gore*, 517 U.S. 559, 572 (1996) (a State may not "impose economic sanctions on violators of its laws with the intent of changing the [violator's] lawful conduct in other States"); *Healy* v. *Beer Inst.*, 491 U.S. 324, 336 (1989) (the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's

borders"). A state law does not cease to be extraterritorial merely because it has some nexus to local persons or activities. Such a law is impermissibly "extraterritorial" for purposes of the Commerce Clause if it has "the practical effect of * * * control[ling] conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336.

The Commerce Clause's prohibition on a State's regulation of conduct beyond its borders protects against "inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Healy*, 491 U.S. at 336-337. When, as here, a State seeks to project its regulatory regime into the jurisdiction of another Nation, the potential is particularly great for inconsistent legislation and resulting conflict, as well as for interference with United States foreign policy. Cf. *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (even *federal* laws must clearly indicate that they are to apply extraterritorially to "protect against unintended clashes between our laws and those of other nations which could result in international discord").[5]

2. A State is also constrained by the Due Process Clause from regulating contracts or transactions that do not have a significant relationship to its legitimate interests. See, *e.g.*, *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 818-819 (1985); *Home Ins. Co.* v. *Dick*, 281 U.S. 397, 407-408 (1930). In *Dick*, for example, the Court held that a Texas insurance statute could not, consistent with due process, be applied to invalidate a provision contained in a policy that had been issued in Mexico and was to be performed there. See 281

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[5] In addition, the Commerce Clause protects against state regulation, whether or not viewed as extraterritorial, that prevents the United States from "speak[ing] with one voice when regulating commercial relations with foreign governments." *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 449 (1979). As discussed below (at 16-19), HVIRA presents that constitutional deficiency as well.

U.S. at 408. The Court explained that, because all acts relating to the making and performance of the policy occurred outside the State, "Texas was therefore without power to affect the terms of contracts so made." *Ibid.*; see *id.* at 408 n.5 ("[A] State is without power to impose either public or private obligations on contracts made outside of the state and not to be performed there."); *Shutts*, 472 U.S. at 821 (a State cannot apply its own law to "a transaction with little or no relationship to the [State]").

Those cases make clear that a State is not entitled under the Due Process Clause to regulate out-of-state transactions simply because some parties to those transactions reside within the State. Indeed, the policyholder in *Dick* was a citizen and permanent resident of Texas, although he engaged in all conduct relevant to the policy while in Mexico. The Court held that Texas did not have a sufficient relationship to the policy to permit the State to regulate it. See 281 U.S. at 408. And, in *Shutts*, the Court held that Kansas could not apply its law to out-of-state plaintiffs' claims with respect to out-of-state leases, although the defendant did business in the State. See 472 U.S. at 818-819.

B. HVIRA, By Imposing Disclosure Requirements With Respect To Out-Of-State Transactions Between Out-Of-State Parties, Is An Impermissible Extraterritorial Regulation

1. Whether analyzed under the Commerce Clause or the Due Process Clause, HVIRA is an impermissible extraterritorial regulation. Its "practical effect" is to compel "conduct beyond the boundaries of the State," *Healy*, 491 U.S. at 336—specifically, the collection, compilation, and disclosure of information, presumably located in Europe, concerning transactions that occurred exclusively in Europe between European parties. There is no nexus between those transactions and the legitimate interests of California that permits the State to exercise regulatory authority over

them. It is especially evident that HVIRA exceeds the proper legislative jurisdiction of the State because the statute is not one of general applicability that happens to have an extraterritorial effect; instead, HVIRA is specifically directed at transactions that occurred in Europe during a time of international conflict.

The conclusion that HVIRA is an unconstitutional exterritorial regulation is confirmed by "considering how [such laws] may interact with the legitimate regulatory regimes of other States," *Healy*, 491 U.S. at 336, and Nations. It is plain that HVIRA has the potential to interfere with other jurisdictions' laws limiting the disclosure of private information concerning insurance policies issued in those jurisdictions. As the court of appeals recognized, an insurer that fails to disclose the information required by HVIRA will have its California license suspended, even if "disclosure pursuant to HVIRA [would] violate[] European data protection laws." Pet. App. 25a.

2. The court of appeals reasoned that HVIRA is not an impermissible extraterritorial regulation because it does "not seek to regulate the substance of out-of-state transactions." Pet. App. 15a (addressing due process challenge); accord *id.* at 43a (addressing Commerce Clause challenge). The court viewed HVIRA as "requir[ing] California insurers *only to disclose information about* their foreign transactions or those of their affiliates." *Id.* at 16a.

The court of appeals' reasoning rests on the erroneous premise that "[a] request for information is simply not equivalent" to a regulation. Pet. App. 16a. A requirement that a person disclose, or refrain from disclosing, confidential information is regulatory in nature. It imposes a substantive obligation on that person, the violation of which carries adverse consequences. See *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 28 (1990) (describing "rules which require regulated entities to disclose information" as "[a]mong the

regulatory tools available to [the] Government"); see also *BMW*, 517 U.S. at 572-573 (a State may not impose sanctions for failure to follow its disclosure standards in other States); *Gallagher*, 267 F.3d at 1238 (observing that the disclosure provisions of a similar statute "pertain to, and as a practical matter unquestionably seek to regulate," Holocaust-era policies). Indeed, the tension between HVIRA and European privacy laws belies any claim that disclosure or privacy laws do not regulate or present Commerce Clause and Due Process Clause difficulties.

The court of appeals suggested that HVIRA is constitutionally justified by the State's purpose to "protect[] its residents from insurance companies that have not paid valid claims." Pet. App. 16a. A State cannot evade limits on extraterritorial legislation merely by deeming a corporation's conduct abroad relevant to its ability to perform within the State. More broadly, a statute with an impermissible extraterritorial effect cannot be saved by identifying an arguably permissible domestic purpose. In any event, the express purpose of HVIRA is to facilitate the resolution of claims on policies issued in Europe before and during World War II, rather than to assess the fitness of insurers to do business in California today. See Cal. Ins. Code § 13801(d) and (e) (HVIRA is designed "to ensure the rapid resolution of * * * questions" concerning "insurance policies held by Holocaust victims and survivors," so as to "eliminat[e] the further victimization of these policyholders and their families"); see also pp. 5-6, *supra* (discussing related statutes directed at facilitating such claims). By contrast, HVIRA makes no mention of the purpose that the court posited.

Nor do any other features of HVIRA suggest that its purpose or primary operative effect is to enable the Commissioner to verify the *bona fides* of insurers doing business in the State. To the contrary, HVIRA requires insurers to

provide information for a public Holocaust Era Insurance Registry. Moreover, the information sought by HVIRA is too remote, too dated, and, at the same time, too detailed to support the court of appeals' posited purpose. That information is tailored to the payment of past European claims, not to the assessment of current in-state performance. Indeed, the Commissioner already has broad statutory authority to gather information to assess the "fairness and honesty of methods of doing business" of any insurer that seeks to do business in the State. Cal. Ins. Code §§ 717 (qualifications of license), 733 (authority to examine "all [the insurer's] affairs"), 1215.6 (authority to obtain documents in possession of "the insurer or its affiliates").

3. The Ninth Circuit's decision upholding HVIRA under the Due Process Clause cannot be reconciled with the Eleventh Circuit's decision in *Gallagher* invalidating a similar Florida statute. In *Gallagher*, as here, the statute required each insurer doing business in the State to disclose extensive information concerning policies issued by itself or its affiliates in Europe between 1920 and 1945. See 267 F.3d at 1229-1230. The Eleventh Circuit held that the statute "exceed[ed] the constitutionally permissible regulatory authority of the Florida legislature" under the Due Process Clause, because the statute required "Florida insurers * * * to produce and compile information regarding transactions between non-Florida residents that occurred entirely outside Florida." *Id.* at 1234; see *id.* at 1238 (recognizing that "there is virtually *no* connection between the State of Florida" and the subject of the disclosure statute, *i.e.*, "insurance transactions involving [domestic insurers'] German affiliates that took place years ago in Germany, among Germany residents, under German law, relating to persons, property, and events in Germany").[6]

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[6] None of the grounds on which the Ninth Circuit attempted to distinguish *Gallagher* from this case is persuasive. For example, the Ninth

4. The court of appeals held that HVIRA was shielded from Commerce Clause scrutiny by Section 2(a) of the McCarran-Ferguson Act, 15 U.S.C. 1012(a), which provides that "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." See Pet. App. 40a-45a. That holding is inconsistent with this Court's recognition in *FTC* v. *Travelers Health Ass'n*, 362 U.S. 293 (1960), that the McCarran-Ferguson Act was not intended to "authorize state regulation of extraterritorial activities." *Id.* at 301; see *id.* at 300 ("Congress viewed state regulation of insurance solely in terms of regulation by the law of the State where occurred the activity sought to be regulated."). The Court explained that a contrary construction of the Act would raise serious constitutional questions, *id.* at 302, and undermine Congress's "basic motivating policy" of leaving the regulation of insurance to those "in close proximity to" the people and policies regulated, *id.* at 301-302.[7]

Circuit suggested that the Florida statute, in contrast to HVIRA, sought information directly from "both local and foreign entities." Pet. App. 9a-10a. In fact, the Florida statute, like HVIRA, applies directly only to "[a]ny insurer doing business in th[e] state." *Gallagher*, 267 F.3d at 1230. In addition, the Ninth Circuit suggested that the Eleventh Circuit did not consider whether the Florida statute could be justified as a means of assessing insurers' fitness to do business in the State. See Pet App. 10a. In fact, the Eleventh Circuit noted the State's "litigating position" that the statute could be so justified, but concluded that the text and structure of the statute did not support that position. See *Gallagher*, 267 F.3d at 1239-1240. The Ninth Circuit further suggested that the Florida statute was distinguishable because it "contained both disclosure and substantive elements" governing Holocaust-era claims. Pet. App. 10a- 11a. The legislation that enacted HVIRA, however, likewise contained other provisions to facilitate the litigation of such claims. See *id.* at 117a-118a.

[7] As the court of appeals observed (Pet. App. 41a), *Travelers* arose under an exception to the McCarran-Ferguson Act that provides that certain Acts of Congress "shall be applicable to the business of insurance to the extent that such business is not regulated by State Law." 15 U.S.C. 1012(b). The exception is the mirror image of the general rule in 15 U.S.C. 1012(a) that "[t]he business of insurance * * * shall be subject to the laws of the several States which relate to the regulation * * * of such business." Nothing in the text, structure, or history of the McCarran-Ferguson Act provides any reason to view the scope of the States' authority to regulate insurance differently under the two similarly worded provisions.

II. HVIRA IMPERMISSIBLY INTRUDES INTO MATTERS OF FOREIGN RELATIONS RESERVED TO THE NATIONAL GOVERNMENT

1. This Court has repeatedly emphasized that "[i]n international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 448 (1979); see, *e.g.*, *United States* v. *Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively."); *Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941) ("The Federal Government * * * is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties."). The national government's preeminent role in acting for the United States in the international arena is reflected in the Constitution's express grants of power to Congress, see, *e.g.*, Art. I, § 8, Cls. 1, 3, 11 (powers to "provide for the common Defence," "regulate Commerce with foreign Nations," and "declare War"), and to the President, see, *e.g.*, Art. II, §§ 2, 3 (powers to serve as "Commander in Chief of the Army and Navy," "make Treaties," "appoint Ambassadors," and "receive Ambassadors"), and in its express restraints on state power, see, *e.g.*, Art. I, § 10 (restrictions on States' "enter[ing] into any Treaty, Alliance, or Confederation," "lay[ing] any Imposts or Duties on Imports or Exports," "enter[ing] into any Agreement * * *

with a foreign Power," and "engag[ing] in War"). The national government has traditionally exercised such power in dealing with foreign governments with respect to the resolution of claims in the wake of international conflict. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 679 (1981).

In light of the "imperative[] * * * that federal power in the field affecting foreign relations be left entirely free from local interference," *Hines*, 312 U.S. at 63, state "regulations must give way if they impair the effective exercise of the Nation's foreign policy." *Zschernig* v. *Miller*, 389 U.S. 429, 440 (1968); see *Japan Line*, 441 U.S. at 449 (state regulations may not prevent the United States from "speak[ing] with one voice when regulating commercial relations with foreign governments"). This Court has struck down such state regulations, "even in [the] absence of a treaty" or an Act of Congress, *Zschernig*, 389 U.S. at 441, as inconsistent with the Constitution's assignment to the national government of the authority to conduct foreign relations or, in the commercial area, as inconsistent with the Foreign Commerce Clause. See, *e.g.*, *Japan Line*, 441 U.S. at 452-453 (foreign commerce); *Zschernig*, 389 U.S. at 436 (foreign affairs); *Chy Lung* v. *Freeman*, 92 U.S. 275 (1875) (same).

2. HVIRA intrudes into matters of foreign relations exclusively reserved to the national government. The resolution of claims arising out of the Nazi era in Europe has long been a subject of United States diplomatic attention. In the context of still-unresolved claims against foreign enterprises arising out of the Holocaust, the President has determined that it is preferable for such claims to be pursued through non-adversarial processes rather than litigation. The President has concluded that such an approach serves the interests of Holocaust victims and their families as well as the United States' interest in cooperative relations with its European allies.

In particular, the United States, in its executive agreements with Germany and Austria and its other recent diplomatic efforts, has encouraged the use of ICHEIC as the exclusive mechanism for resolving Holocaust-era insurance claims. Those agreements do not, of their own force, extinguish or bar any claims that Holocaust victims or their families might assert in court against German and Austrian companies. They do make clear, however, that United States policy disfavors the imposition of further obligations on companies subject to the agreements, whether through regulation or litigation, beyond those contemplated by the agreements themselves. Thus, the executive agreement between the United States and Germany recognizes that it is "in the[] interests" of the two governments for the designated claims process "to be the exclusive remedy and forum for the resolution of all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II." Pet. App. 155a (Art. 1, ¶ 1).

HVIRA threatens to "impair the effective exercise," *Zschernig*, 389 U.S. at 440, of United States policy with respect to Holocaust-era claims. As explained above, the United States has sought to achieve voluntary participation in international claims processes and to encourage the exclusive use of those processes as an expeditious, fair, and comprehensive alternative to litigation. State laws such as HVIRA are not laws of general applicability with an incidental effect on the federal government's ongoing efforts. To the contrary, they are expressly and specifically directed at establishing competing processes with their own disclosure requirements and potentially their own forums and remedies for Holocaust-era claims. Such laws impose "a different, state system of economic pressure," *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 376 (2000), and may impede the implementation and operation of the

international claims processes. See, *e.g.*, *Joint Statement*, note 3, *supra*, (noting the "potentially disruptive and counterproductive effects" of such laws). At a minimum, such laws "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments." *Crosby*, 530 U.S. at 381. They also generate the very tensions in foreign relations that the United States has sought to avoid. For example, the United States has received protests from Germany and Switzerland concerning HVIRA's application to insurance policies written in those countries.

3. In declining to invalidate HVIRA as inconsistent with the national government's authority over foreign affairs, the court of appeals attempted to distinguish this case from *Zschernig*. None of its suggested distinction bears on whether HVIRA is an impermissible "intrusion by the State into the field of foreign affairs which the Constitution entrusts in the President and the Congress." *Zschernig*, 389 U.S. at 432.

For example, the court of appeals observed that the Court invalidated the state probate statute in *Zschernig* only after the statute had disrupted foreign relations. See Pet. App. 56a-59a. Nothing in *Zschernig* suggests that a state statute cannot be invalidated until its adverse impact on foreign relations has been fully manifested. And, in *Chy Lung*, the Court invalidated a state statute, without any inquiry into its actual impact, on the ground that the statute, by its nature, would create international tension. See 92 U.S. at 279. In any event, as the protests from Germany and Switzerland demonstrate, HVIRA has, in fact, affected the United States' foreign relations.

The court of appeals also sought to distinguish *Zschernig* on the grounds that HVIRA "involve[s] foreign commerce" and is "not directed at a particular country." Pet. App. 59a. To the extent that those observations accurately distinguish

Zschernig, they suggest that HVIRA is more, not less, constitutionally problematic. A state statute that interferes with the United States' *commercial* relations with other Nations may be invalid under *both* the Foreign Commerce Clause and the foreign affairs power. See *National Foreign Trade Council* v. *Natsios*, 181 F.3d 38, 53-55, 68-69 (1st Cir. 1999) (invalidating state statute on both foreign affairs and foreign commerce grounds), aff'd on other grounds, 530 U.S. 363 (2000). Nor need a state statute be "directed at a particular country" to be invalidated under the foreign affairs power. No such statute was involved in *Chy Lung* or *Zschernig*. Moreover, HVIRA is clearly directed at insurance policies issued to persons in certain European countries, which explains why it has drawn objections from two of those countries and which makes its interference with foreign affairs even more manifest.

Finally, the court of appeals erred in refusing, based on a misunderstanding of *Barclays Bank PLC* v. *Franchise Tax Board*, 512 U.S. 298 (1994), to consider the views of the Executive Branch regarding the foreign policy ramifications of HVIRA. See Pet. App. 55a. As this Court has explained, *Barclays* addressed an unusual situation in which Congress and the Executive had taken divergent positions. See *Crosby*, 530 U.S. at 385-386. *Crosby* reaffirms the central importance in other situations of the President's views in exercising his constitutional responsibility "to speak for the Nation with one voice in dealing with other governments." *Id.* at 381, 385-386.[8]

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[8] The court of appeals incorrectly viewed the Holocaust Assets Commission Act of 1998, Pub. L. No. 105-186, 112 Stat. 611, as a congressional endorsement of state statutes such as HVIRA. See Pet. App. 47a-50a. The Act establishes a commission to address the disposition of certain Holocaust-era assets that "came into *the possession or control of the Federal Government*" after January 30, 1933. § 3(a)(1), 112 Stat. 612 (emphasis added). It directs the commission to "encourage the National

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

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Association of Insurance Commissioners to prepare a report on the Holocaust-related claims practices of all insurance companies, both domestic and foreign, *doing business in the U.S.* at any time after January 30, 1933," that issued an insurance policy to "any individual on any list of Holocaust victims." § 3(a)(4)(A), 112 Stat. 612 (emphasis added). It states that the report should include, "to the degree the information is available," the "number of policies issued by each company" to Holocaust victims, the "value of each policy at the time of issue," the "total number of policies and the dollar amount[s] that have been paid out," and the "total present-day value of assets in the United States of each company." § 3(a)(4)(B), 112 Stat. 613. Nothing in the Act imposes reporting requirements on insurers under threat of sanctions, confers any new authority on the States to do so, or seeks the sort of private information that may be protected from disclosure under foreign law.

* The Solicitor General is recused in this case.

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IN THE

Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, *et al.*,
Petitioners,

v.

HARRY LOW, COMMISSIONER OF INSURANCE
FOR THE STATE OF CALIFORNIA,
Respondent.

GERLING GLOBAL REINSURANCE CORP. *et al.*,
Petitioners,

v.

HARRY LOW, COMMISSIONER OF INSURANCE
FOR THE STATE OF CALIFORNIA,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE FEDERAL REPUBLIC OF GERMANY AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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The Federal Republic of Germany respectfully submits this brief as amicus curiae in support of the petitions for writs of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in *Gerling Global Reinsurance Corp. of America v. Low*, 240 F.3d 739 (2001), and *Gerling Global Reinsurance Corp. of America v. Low*, 296 F.3d 832 (2002).[1]

INTEREST OF AMICUS CURIAE

The Federal Republic of Germany has a very strong interest in this case, as reflected by its prior participation as an amicus curiae, because the California regulatory statute at issue, the Holocaust Victim Insurance Relief Act of 1999 ("HVIRA"),[2] has a manifestly adverse impact on the Federal Republic's sovereign interests and on its foreign relations with the United States of America. In addition, the HVIRA, if enforced, would require German companies who themselves do no business in California to violate German privacy laws. The Federal Republic submits this amicus curiae brief to make clear the extent to which actions of the State of California infringe on the sovereignty of the Federal Republic in these matters and impair the ability of the Federal Republic to engage in diplomatic relations with the United States.

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[1] Petitioners and respondent have consented to the filing of this brief; their letters of consent are on file with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Federal Republic of Germany, made a monetary contribution to the preparation or submission of this brief.

[2] Cal. Ins. Code §§ 13800-13807 (SER 516-524). "ER" refers to the Excerpts of Record in the preliminary injunction appeal, and "SER" refers to the Supplemental Excerpts of Record in the permanent injunction appeal.

SUMMARY OF ARGUMENT

The Ninth Circuit's decisions upholding the actions of the State of California affront the sovereignty of the Federal Republic. Its sovereign interests are neither marginal nor academic—the question of restitution and compensation for victims of the National Socialist era and World War II is of the utmost importance for Germany, both as a matter of domestic and foreign policy. Germany has worked constructively with the United States and other members of the international community for over 55 years to structure and provide over $100 billion in compensation to victims.

The HVIRA directly interferes with implementation of the most recent international agreements—the July 17, 2000 "Berlin Agreements"[3]—pursuant to which the Federal Republic and German companies agreed to create a Foundation to provide DM 10 billion (approximately $5 billion) in additional compensation to victims, including those whose insurance policies from the National Socialist era may have been unpaid. By international accord, the Foundation is to be the exclusive remedy and forum for all asserted claims, including insurance-related claims.[4]

Not content with U.S. foreign policy and international agreements on Holocaust-era insurance claims that promote conciliation and legal peace, the State of California has pursued its own more aggressive "foreign policy," attempting to regulate how insurance companies in Germany (and

[3] Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America concerning the Foundation, "Remembrance, Responsibility and the Future," July 17, 2000 ("Executive Agreement") (ER 818-37, SER 1447-53); Joint Statement on Occasion of the Final Plenary Meeting Concluding International Talks on the Preparation of the Foundation, "Remembrance, Responsibility and the Future," July 17, 2000 ("Joint Statement") (ER 812-16).

[4] *See* Executive Agreement, art. 1(1), 1(4) (ER 821-22).

elsewhere in Europe) should address the consequences of the National Socialist era and World War II and attempting to set up California courts as a forum for contentious litigation regarding such claims. Seeking to leverage its regulatory authority over California insurance companies to regulate the conduct of insurance companies overseas, the State of California enacted a statute that threatens to revoke the license of any California insurance company whose German (or other European) affiliates fail to place in a public registry established by the State of California extensive information, including personal data, regarding every insurance policy issued in Europe to Europeans between 1920 and 1945.

The Ninth Circuit decisions upholding the HVIRA directly conflict with decisions of other Circuits and violate well-established legal principles: (a) by holding, in the first decision, that the HVIRA did not violate limits imposed on state power by the reservation to the federal government of the Foreign Affairs power and by the dormant Foreign Commerce Clause of the U.S. Constitution; and (b) by holding, in the second decision, that the HVIRA did not exceed limits imposed on state power by the Due Process Clause of the U.S. Constitution to legislate with respect to matters outside its boundaries. Certiorari is necessary and appropriate because the Ninth Circuit's decisions, if left unreviewed and uncorrected, would endorse the State of California's intrusion on German sovereignty and impede the Federal Republic's ability to engage in diplomatic relations with the United States as a unitary political entity.

ARGUMENT

1. German Sovereign Interests Regarding the Regulation of German Insurance Companies and Data Protection

The Federal Republic has sovereign authority to regulate insurance companies in Germany. The Federal Republic has enacted an extensive statutory framework, including the

Insurance Supervision Law (Versicherungsaufsichtsgesetz or VAG). The VAG designates the Federal Financial Services Supervisory Office (Bundesanstalt für Finanzdienstleistungsaufsicht (BAFIN), formerly known as Bundesaufsichtsamt für das Versicherungswesen (BAV)) as the competent supervisory body of the federal government for the regulation of insurance in Germany and grants the BAFIN significant powers to regulate the German insurance market. §§ 81-103 VAG.

German insurance companies are also subject to other provisions of German law, including German privacy laws such as the Federal Data Protection Law (Bundesdatenschutzgesetz or BDSG). Germany, like most European countries, has "data protection" laws that are typically far more stringent than in the United States and reflect a strong social policy against dissemination of private information that may be in governmental or corporate records. The BDSG prohibits the disclosure of personal data, including the disclosure of certain information regarding insurance policy records by German insurance companies without the express authorization of policyholders or their beneficiaries. § 28(2) Nr. 1b BDSG.

As the Federal Republic advised the Ninth Circuit,[5] the relevant German regulatory agencies have concluded that compliance by German companies with the HVIRA would cause them to violate German law and thereby become subject to civil and criminal penalties.[6] As the Federal Republic informed the Ninth Circuit, these are correct

[5] Brief Amicus Curiae Supporting Affirmance of Summary Judgment for Plaintiffs-Appellees/Cross-Appellants (filed March 18, 2002) ("March 18, 2002 FRG Brief") at 15-17.

[6] The District Government of Cologne, Germany, concluded on May 16, 2000, that under the BDSG "the transmission of data in the form of lists pertaining to all policyholders from 1920-1945 . . . *is not permissible*." (ER 1182) (emphasis added).

conclusions under German law.[7] The HVIRA purports to require public disclosure in California of all policies issued in Europe between 1920 and 1945, necessarily revealing personal and confidential information regarding a million or more policies held by persons who were not victims of National Socialist persecution.

2. German Sovereign Interests Regarding Post-War Restitution and Compensation Programs

The question of restitution and compensation for Holocaust victims, including payments on unpaid insurance policies, has been an overarching concern of the Federal Republic since the end of the World War II. As the first German Chancellor, Konrad Adenauer, acknowledged fifty years ago: "[U]nspeakable crimes have been committed, and they demand restitution, both moral and material."[8] Accordingly, since its founding in 1949, the Federal Republic has sought to address the heinous wrongs committed during the National Socialist era and World War II, with full awareness that no amount of money will ever be enough to atone for those crimes.

In accordance with established principles of international law and custom, Germany and the international community have dealt with the question of restitution and compensation exclusively on a governmental and intergovernmental basis pursuant to international agreements among Germany, the United States, and other sovereign nations and pursuant to German domestic legislation. The Federal Republic entered into a series of international agreements after the war regarding restitution and compensation for victims of the National Socialist era and World War II with all Western European nations, the United States, and Israel. After the fall

[7] March 18, 2002 FRG Brief at 17.

[8] Germany Online, "German Compensation for National Socialist Crimes," *at* http://www.germany-info.org/newcontent/np.bak/np_3g.html (last visited Dec. 12, 2002).

of the Iron Curtain, Germany reached comparable agreements with Eastern European nations.

Pursuant to its international obligations, the Federal Republic enacted legislation establishing extensive restitution and compensation programs over the past 55 years to remedy the wrongs committed during the National Socialist era and World War II. As part of these programs, Germany returned all real estate and other assets capable of being restored to their rightful owners, including 700,000 objects of art and 2.5 million books; paid over two million claims for assets that could not be returned, including virtually all insurance policies; and reached global settlements with Jewish survivor organizations with respect to those victims who died without heirs or did not file compensation claims. To date, the Federal Republic has paid roughly $100 billion in compensation and continues to pay about $600 million annually to about 100,000 pensioners.[9] The United Nations has applauded the Federal Republic's restitution and compensation programs as "[t]he most comprehensive and systematic precedent of reparation by a Government to groups of victims for the redress of wrongs suffered . . . ."[10]

3. German-U.S. Agreement on a German Foundation

Germany's consistent practice of addressing the consequences of the National Socialist era on a governmental and intergovernmental basis culminated in the year 2000 in an international agreement between the Federal Republic and the United States on the creation of a German Foundation to provide a further measure of relief to aging victims, including those who suffered at the hands of German companies. *See*

[9] *See id.*

[10] *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th Sess., Provisional Agenda Item 4, at 55, ¶ 107, U.N. Doc. E/CN.4/Sub. 2/1993/8.

Executive Agreement (ER 818-37, SER 1447-53). This Agreement resulted from nearly two years of negotiations under the leadership of Chancellor Schröder and President Clinton. The twin objectives of the Executive Agreement are "to complement the creation of the Foundation and to foster all-embracing and enduring legal peace for German companies with respect to the National Socialist era and World War II." *Id.*, art. 3(1) (ER 824).

The German Parliament (Bundestag) established the Foundation pursuant to the Foundation Law as an instrumentality of the Federal Republic.[11] It is endowed with assets of $5 billion, half contributed by the Federal Republic and half on a voluntary basis by thousands of German companies. The Foundation will provide payments to over a million aging victims of National Socialist oppression and persecution, specifically including payments on any insurance policies that remain unpaid notwithstanding the earlier extensive post-war restitution and compensation programs. The Executive Agreement declares that it is in the foreign policy interests of the Federal Republic and the United States for the Foundation to be the exclusive remedy and forum for addressing all claims, including insurance claims, asserted against German companies arising from the National Socialist era and World War II. *See* Executive Agreement, arts. 1(1), 1(4) (ER 820-22).

Article 1(4) of the Executive Agreement provides that any remaining unpaid insurance policies that come within the claims-handling procedures adopted by the International Commission on Holocaust-Era Insurance Claims (ICHEIC) as of July 2000 will be processed by German companies "on the basis of such procedures and on the basis of additional claims handling procedures that may be agreed among the

[11] *See* German Federal Law on the Creation of a Foundation "Remembrance, Responsibility and the Future," *available at* http://www.stiftung-evz.de/fremdsp/englisch/st_ges_en.html (enacted Aug. 12, 2000) ("Foundation Law").

Foundation, ICHEIC, and the German Insurance Association." *Id.*, art. 1(4) (ER 822). On October 16, 2002, the Foundation, ICHEIC, and the German Insurance Association signed an agreement regarding such claims handling procedures and the publication of pertinent insurance records, in a manner that satisfies the requirements of European data protection laws. (Lodg. L70-L89). On October 17, 2002, U.S. State Department spokesman Richard Boucher explained that "[t]he United States continues to support the work of the Foundation, including through fulfillment of its obligations under the July 2000 U.S.-German Executive Agreement. This insurance agreement is the result of ongoing international efforts to address the injustices of World War II and the National Socialist era. The United States continues to support efforts to resolve matters of Holocaust restitution and compensation through cooperative means outside of litigation." U.S. Department of State, Press Statement, *at* http://www.state.gov/r/pa/prs/ps/2002/14455.htm (Oct. 17, 2002).

The Berlin Agreements recognize that "for the last 55 years the parties have sought to work to address the consequences of the National Socialist era and World War II through political and governmental acts" and that "this Agreement and the establishment of the Foundation represent a fulfillment of these efforts." Executive Agreement, preamble (ER 821). The Executive Agreement further states that the Federal Republic and the United States agree that "both parties desire all-embracing and enduring legal peace to advance their foreign policy interests." *Id.* (ER 820). Consistent with German and U.S. foreign policy, the Foundation Law excludes further claims, *see* Foundation Law § 16(1), and the Executive Agreement obligates the United States to take steps both in court and with state and local governments to foster all-embracing and enduring legal peace for German companies. *Id.*, arts. 2(1) and 2(2) (ER 822-23; 832-35).

This bilateral German-U.S. agreement was accompanied by a Joint Statement signed by the Federal Republic, the United States, Israel, five Central and Eastern European nations, the Conference on Jewish Material Claims against Germany, and other interested parties reflecting an international consensus that it is in all parties' interests for the Foundation to be the exclusive remedy and forum for the resolution of all National Socialist era and World War II claims against German companies and that German companies should receive all-embracing and enduring legal peace. *See* Joint Statement, preamble, arts. 4(b) & (c) (ER 812-16).

4. California's Regulation of Conduct with No Connection to California

Dissatisfied with the efforts of sovereign nations and other parties reflected in this international consensus, the State of California enacted the HVIRA and related legislation in 1999 as part of its own incompatible policy of promoting litigation in California courts as a means to redress National Socialist era and World War II wrongs. The HVIRA threatens to revoke the license of any insurance company doing business in California unless it provides for publication in California extensive personal information regarding each insurance policy issued by any German (or other European) "related" affiliate that sold insurance policies in Europe between 1920 and 1945, even if the affiliate never had any connection to the State of California and even if its relationship to a California licensee began long after the war. HVIRA §§ 13804, 13806 (SER 520-21, 523). The HVIRA thus mandates disclosure of a million or more policies held by persons who were not victims of National Socialist persecution. The detailed information required by the HVIRA includes, for each of these policies: the names of the policyholders and beneficiaries; the "current status" of the policy; and the "city of origin, domicile, or address" for each policyholder. HVIRA § 13804(a) (SER 520). Related

California legislation purports to create a California cause of action to recover on Holocaust-era insurance claims and further purports to waive applicable statutes of limitation in conflict with German statutory law.

The HVIRA's extraterritorial reach is vast. It seeks to regulate insurance companies and policies that have no nexus with the State of California: the insurance companies that issued policies between 1920 and 1945 were in Germany (or elsewhere in Europe), and they issued policies in Germany (or elsewhere in Europe). Nothing in the HVIRA requires that the policyholders or beneficiaries have any connection with the State of California. California's attempt to regulate entities and transactions that have no connection to the state violates international law regarding the limits of legislative jurisdiction and the Due Process Clause of the U.S. Constitution.

5. California's Conflicting "Foreign Policy"

The HVIRA directly contravenes German legislation. By threatening to suspend the license of California insurance companies unless "related" insurance companies in Germany agree to the publication in California of detailed information concerning German and other European policies, the HVIRA seeks to supplant the Federal Republic's regulation of insurance companies in Germany with the supposedly more reasoned judgment of the State of California, directly implying that the Federal Republic cannot be trusted to perform its sovereign duties. Furthermore, the HVIRA requires California affiliates to disclose information held by related German insurance companies notwithstanding applicable German privacy laws governing disclosure of the required information. *See* § 28(2) Nr. 1b BDSG. Unauthorized disclosure may result in civil and criminal penalties for German insurance companies, and the State of California's requirement that this information be published raises issues with no obvious solution.

The HVIRA has a direct, significant effect on Germany: if German insurance companies fail to comply with the publication requirements, the California insurance companies to which they are now affiliated (some 55 to 80 years after the issuance of the policies) will lose their licenses to do business in the State of California. The State of California has thus improperly leveraged its regulatory authority over insurance companies doing business in California to regulate the conduct of "related" insurance companies in Europe that have never done business in the state and are under the regulatory jurisdiction of Germany.

The HVIRA is also directly at odds with the German-U.S. Agreement and seeks to second-guess over 55 years of intergovernmental and governmental measures undertaken by the Federal Republic, the United States, and other sovereign nations to address the consequences of the National Socialist era and World War II. The HVIRA seeks to implement California's own "foreign policy" by replacing the international consensus on nonconfrontational resolution through the German Foundation with a scheme premised on coerced publication and litigation in California courts.

The puzzling assertions in the panel's first decision that (a) "there is no evidence that HVIRA would be applied in a way that would implicate the diplomatic concerns mentioned in *Zschernig*,"[12] and (b) "HVIRA and the executive branch initiatives [including the Executive Agreement] share the same policy objective, although they seek to achieve that policy objective by varying techniques"[13] are remarkably erroneous. It simply cannot be that a policy of the United States Government expressly recognizing that it is in the United States' foreign policy interests for the German

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[12] *Gerling Global Reinsurance Corp. of America v. Low*, 240 F.3d 739, 753 (9th Cir. 2001) (citing *Zschernig v. Miller*, 389 U.S. 429 (1968)).

[13] *Id.* at 750.

Foundation to be the *exclusive remedy and forum* and seeking to end all litigation in United States courts of National Socialist era claims shares the same objective as a California regulatory statute that seeks to force publication of information to set up the California state courts as a second forum for contentious litigation of the same claims; nor is there any way rationally to conclude that the California statute does not implicate United States Government diplomatic concerns that mirror those of the Federal Republic. The panel arbitrarily turned a blind eye to the submissions of both the Federal Republic and the United States, which convincingly proved just the opposite. As the amicus brief of the United States quite plainspokenly said, "the premise of the California legislation is in direct conflict with that of United States foreign policy."[14]

The Ninth Circuit's decisions cloud the ability of the Federal Republic to engage in productive negotiations with the United States by impairing the ability of the United States to speak with one voice on matters of foreign affairs and foreign commerce. The diplomatic, economic, and other foreign policy factors that the Federal Republic, the United States, and the other sovereign nations weighed in reaching the international consensus on the establishment of the Foundation and legal peace for German companies extend well beyond any possible interests of the State of California.

The Ninth Circuit's decisions, if left unreviewed, would also invite other states to substitute their own foreign policy objectives for that of the United States, opening the door to intrusive and potentially inconsistent regulation of insurance companies in Germany by 50 separate states. At least six

[14] Brief for Amicus Curiae the United States of America in Support of Rehearing *En Banc* (filed Aug. 5, 2002) (ER 1255-77).

states in addition to California (Florida,[15] Maryland, Minnesota, New York, Texas, and Washington) have enacted legislation—and at least four other states (Illinois, Massachusetts, New Jersey, and Rhode Island) have introduced legislation—to regulate in potentially inconsistent ways foreign insurance companies that issued policies in Europe over 55 years ago. Several of these states took legislative action soon after the Ninth Circuit's first decision.

6. The Need for Review of the Ninth Circuit's Decisions

The decisions of the Ninth Circuit affront German sovereignty every day they remain unreviewed and uncorrected. The Ninth Circuit's decisions were particularly offensive in failing even to acknowledge the position of the Federal Republic (and the United States) set forth in four amicus curiae briefs filed with the Ninth Circuit. The panel altogether ignored these submissions and articulated no rationale for its *sub silentio* rejection of the views of the two governments that co-chaired the negotiations that led to the Berlin Agreements and entered into the Executive Agreement and, with others, the Joint Statement. The panel's decisions thus fall well short of established norms of reasoned decisionmaking.

Unless corrected, the Ninth Circuit's assault on the internationally negotiated resolution of Holocaust-related issues will detrimentally interfere with German-U.S. relations and with the achievement of important German (and U.S. federal) foreign and domestic policy objectives. The Ninth Circuit's decisions sustaining the State of California's pursuit of its own "foreign policy" threaten a fundamental premise of the bilateral Agreement and German-U.S. foreign relations—that the Foundation should be the exclusive remedy and forum for addressing all claims asserted against German

[15] The Eleventh Circuit struck down substantially identical legislation enacted in Florida. *See Gerling Global Reinsurance Corp. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001).

companies arising from the National Socialist era and World War II, including claims regarding any remaining unpaid insurance policies. The Ninth Circuit's decisions also undermine the ability of the United States to help achieve "all-embracing and enduring legal peace" for German companies both in courts and before state and local regulatory bodies. The Ninth Circuit's errors in allowing California to interfere with the conduct of U.S. foreign policy, the operation of foreign commerce, and the regulation of insurance companies in Germany are important to both the United States and its allies and should be corrected.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for a writ of certiorari to review the Ninth Circuit's decisions.

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Supreme Court of the United States

GERLING GLOBAL REINSURANCE CORP. OF AMERICA; GERLING GLOBAL REINSURANCE CORP. – U.S. BRANCH; GERLING GLOBAL LIFE REINSURANCE COMPANY; GERLING GLOBAL INSURANCE COMPANY; GERLING AMERICAN INSURANCE COMPANY; AND CONSTITUTION INSURANCE COMPANY,

Petitioners,

vs.

HARRY W. LOW, in his capacity as the Commissioner of Insurance of the State of California,

Respondent.

AMERICAN INSURANCE ASSOCIATION, AMERICAN RE-INSURANCE COMPANY, ET AL.,

Petitioners,

vs.

HARRY W. LOW, in his capacity as the Commissioner of Insurance of the State of California,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE BET TZEDEK LEGAL SERVICES IN SUPPORT OF THE OPPOSITION BY RESPONDENT HARRY W. LOW TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Bet Tzedek, "The House of Justice", is a non-profit, pro bono legal services agency that since 1974 has been providing free, high quality, compassionate legal representation to thousands of low-income residents throughout Southern California. Bet Tzedek provides these services to clients of all racial, religious and ethnic backgrounds and is perhaps the only organization in the United States regularly representing survivors of the Holocaust, completely free of charge, in their efforts to secure reparations for the horrors endured during the World War II era.

Over the past several years, Bet Tzedek has represented more than 1,000 Holocaust survivor clients, all of whom are elderly and poor. Each has been assisted in their efforts to assert claims under German-based reparations programs, United States-based litigation, and other humanitarian relief programs administered by various international funds or governments. With the assistance of more than 400 volunteer lawyers from throughout the greater Los Angeles community, Bet Tzedek's full-time staff is able to provide this unique assistance to this long-suffering community of clients, completely free of charge.

Bet Tzedek's experience has shown that those who are aged, infirm and low-income have the most difficult time

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[1] Pursuant to Supreme Court Rule 37.3(a), Bet Tzedek Legal Services has obtained consent from all parties to file this *amicus curiae* brief. Pursuant to Supreme Court Rule 37.6, Bet Tzedek Legal Services is the sole author of the entirety of this brief and no person, firm or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief.

accessing the judicial system. This is particularly true for those who may have language barriers, who come from other countries and cultures, and who, due to age and infirmity, are losing some of their mental sharpness. Into these categories fall thousands of Holocaust survivors. Bet Tzedek's Holocaust survivor clients average close to 80 years of age, and each is living below poverty-level standards.

Many of Bet Tzedek's clients have either made claims, or are contemplating the filing of claims, for payment of insurance benefits due under life and other insurance policies purchased by their families prior to the outbreak of World War II. The policies were purchased from, among others, the petitioner insurance companies or their affiliates. Due to the destructive actions of the Nazi regime, those who survived would not escape with possessions or copies of policies. Only the companies can now be expected to have those records. Accordingly, Bet Tzedek's clients have a substantial and material interest in this Court's determination of the issues presented.

Specifically, Bet Tzedek's clients are dependent on the reporting requirements of the statute here at issue, the Holocaust Victims Insurance Relief Act of 1999, California Insurance Code, sections 13800-13807 ("HVIRA"). HVIRA obligates insurers doing business in California to identify all insurance policies sold in Europe during the period 1920-1945 by themselves directly or by their European affiliates.

The statute requires disclosure of the names and last known addresses (or cities of domicile) of the policy holders and the current status of those policies. It is this disclosure provision that is of utmost importance to Bet

Tzedek and its clients. Without the ability to access *truthful* information that is exclusively and uniquely under the control of the petitioner insurance companies, Bet Tzedek's clients have never had, and will never have, the chance to assert claims for benefits their families intended them to have.

More importantly, however, the reporting requirements of HVIRA will finally give Bet Tzedek's aging and infirm clients the opportunity to learn their family histories and truths. Because of the advanced age, indigency and declining health of many of these clients, there is, realistically, only a slim chance that their fifty-year-old claims will yield monetary rewards during their lifetimes. The claimants are passing away and the likelihood they will die before these proceedings conclude is rapidly increasing. In addition, awards from such bodies as the International Commission on Holocaust Era Insurance Claims are slow in coming and meager in amount.

Consequently, rising in prominence in survivors' lives is the possibility of finally uncovering truths, finding peace in their histories and salvaging some measure of justice by securing information that has been so long withheld. Receipt of this information by survivors will be, by itself, the culmination of a lifetime of waiting – waiting for acknowledgment that they and their families were right in their quest for benefits and that their determined fight for justice may finally, at least in part, be realized. The benefits of this, alone, are immeasurable.

While some survivors may, as a result, ultimately end up receiving some small economic benefit to help ease the poverty of their final days, the most that many can hope for at this point is the salvation found in the discovery of

information that has been hidden from them for a lifetime. Because of the importance of this issue, Bet Tzedek and its clients have a deep interest in ensuring that all applicable legal and equitable considerations and arguments pertinent to these matters have been presented to the Court.

SUMMARY OF ARGUMENT

The further attempts by the petitioner insurance companies to prevent the implementation of HVIRA will have tragic consequences. The advanced age and infirm, impoverished condition of the vast majority of Bet Tzedek's Holocaust survivor clients is such that many will not survive the months it will take to complete the Court's review process. The plain and simple fact is that the longer implementation of HVIRA is delayed the fewer claimants the petitioners will ever have to deal with. The result will be that many will die never having had the chance to uncover or assert the rightful claims, or learn the truths, that their families bequeathed them.

As has been twice decided by the Ninth Circuit Court of Appeals, the petitioners are incorrect in asserting that HVIRA's straightforward reporting requirements run afoul of the foreign affairs powers of Congress or the due process clause of the Constitution. In assessing the thorough explication of these issues by the court below, equity demands that because further delay will be fatal to many long-suffering claimants, the well-reasoned opinions of the Ninth Circuit should stand and the current writ of certiorari should be denied.

ARGUMENT

I. INTRODUCTION

It is well established that in order to best protect its citizens, the State of California must have the authority to enact measures such as HVIRA. The clients of Bet Tzedek depend on the state's sovereign power to assert the rights of voiceless people so long ignored. In regulating the insurance industry operating within its borders, California is protecting the contractual rights of its own citizens in regard to businesses over which the state unquestionably exercises regulatory authority.

In seeking to exercise that authority, California has enacted a measure that conforms with public policy by assuring that insurance companies operating in the state do so in a responsible manner. The California legislature has determined that insurance companies doing business in California are fit to continue serving the people of the state *only* if full and truthful information is made available to the families of their policy-holders (or the policy-holders of their affiliates) who died in the Holocaust. The state's goal is to protect its citizens from companies that continue to withhold legitimately-needed policy information from aged, infirm survivors of one of history's great atrocities. By requiring the reporting of nothing more than truthful information, California is operating well within the bounds of the Constitution and is, in fact, promoting equity and justice.

II. EQUITY AND JUSTICE REQUIRE THAT THE WRIT OF CERTIORARI BE DENIED AND THAT ELDERLY HOLOCAUST SURVIVORS BE GIVEN THE CHANCE TO RECOVER TRUTHFUL INFORMATION AS SOON AS POSSIBLE

The delay engendered by a proposed granting of petitioners' writ of certiorari will have tragic consequences. Already, a number of Bet Tzedek's elderly, indigent Holocaust survivor clients have died without ever having had the opportunity to find out if their families' histories included an effort to care for them after their parents were brutally murdered for simply being Jewish. Unless HVIRA is enforced, the companies controlling the dissemination of this information will go unchecked, free to withhold information and policy benefits that rightfully belong to those who have already suffered. And the longer the companies are able to delay making these simple disclosures, the longer their actions remain unregulated, the more people will pass away while waiting for truths and acknowledgments that seemingly will never arrive.

Access to policy information may, hopefully, be of at least some economic benefit to a survivor in the long run, should he or she live long enough to pursue a valid claim. Easing the pain of poverty in one's final days is a benefit that should never be minimized. More likely, however, are the short-term non-economic benefits that will be foreclosed by a grant of a writ of certiorari.

Non-monetary benefits such as the search for family histories and truths, acknowledgment of past suffering and prior wrongs, personal satisfaction and dignity are not only legitimate, but crucial considerations in a court's assessment, if a court decides to engage in a balancing of relative hardships. *See, e.g., Chalk v. United States District Court*, 84

F.2d 701, 709 (9th Cir. 1988). For instance, a survivor may gain great personal satisfaction in being able to finally fulfill a promise to a parent to track down the parent's insurance policy should the survivor escape the Nazi death camps. This promise continues to haunt many survivors to this day. A survivor may experience joy in discovering a history that demonstrates a family member's efforts to provide for his or her future. Finally, recovering a piece of ones family history may restore to one a sense of dignity and peace, and perhaps be the first step towards some relief from the poverty that afflicts many a survivor's last days.

Additionally, further delay in enforcing the registry provisions of HVIRA, "even if only for a few months . . . represents precious, productive time irretrievably lost" to a survivor seeking information on her or his family's Holocaust-era insurance policy. *Chalk*, 840 F.2d at 710. Access to policy information may help an elderly survivor establish the validity of a claim, particularly a claim already submitted to, but not yet accepted by, the International Commission on Holocaust Era Insurance Claims ("ICHEIC") – the very body established by several of the very insurance companies now seeking this writ of certiorari.

HVIRA plainly does not regulate the payment of monetary claims nor does it require the payment of monetary claims. If, however, with the information garnered, the survivor is able to successfully pursue a claim, he or she may ultimately realize some economic benefit in the form of a monetary award or settlement. If he or she survives long enough to see the claims process through to its conclusion, the money may be used to relieve the suffering associated with age, infirmity and indigence. If, however, the writ is granted, many survivors will die during its pendency. Lost forever will be the chance to see any

benefit, monetary or not, from the release of truthful, accurate information, long withheld by the insurance companies, about the survivor's own past. "[I]t is not only the claims-handling practices of 50 years ago that are at issue, but also the current and continuing failure of California-licensed insurers and their foreign affiliates to disclose information about any outstanding potentially valid claims." *Gerling Global Reinsurance Corp. of America v. Low*, 296 F.3d 832, 847 (9th Cir. 2002).

Lopez v. Heckler, 713 F.2d 1432 (9th Cir. 1983) offers an ominous warning about the perilous condition of many Holocaust survivors residing in California. Although the present case does not involve the deprivation of government disability benefits dealt with in *Lopez*, the language about the effects of lengthy delays is instructive:

> [They] are largely infirm and disabled, their resources and life spans are by definition extremely limited. Deprivation of benefits pending trial might cause economic hardship, suffering, or even death. Retroactive restoration of benefits would be inadequate to remedy these hardship.
>
> . . .
>
> It is not only the harm to the individuals involved that we must consider in assessing the public interest. Our society as a whole suffers when we neglect the poor, the hungry, the disabled, or when we deprive them of their rights or privileges. . . . It would be tragic, not only from the standpoint of the individuals involved but also from the standpoint of society, were poor, elderly, disabled people to be wrongfully deprived of essential benefits for any period of time.

Lopez, 713 F.2d at 1437.

III. WHEN WEIGHED AGAINST THE TRAGEDIES OF DELAY, THE WEAKNESS OF PETITIONERS' LEGAL ARGUMENTS DEMAND THAT THE PETITION FOR WRIT OF CERTIORARI BE DENIED

By further delaying the implementation of HVIRA, more and more indigent Holocaust survivors will pass away before ever having the chance to learn the truth about their families, much less assert reparations claims. When that urgency is balanced against the unlikely prospect of petitioners' success on the merits of their position, it becomes all the more apparent that the requested writ should be denied forthwith and that California should be permitted to assert its sovereign power to protect its citizens from unjust business practices.

A. HVIRA Does Not Violate the Due Process Rights of Petitioners

Under the California Administrative Procedures Act, all proceedings will be conducted in accord with recognized procedural safeguards, including hearings before an administrative law judge. Cal. Government Code sections 11370-11529. No remedies for violation of HVIRA will be meted out unless and until an allegedly offending insurance company has had the opportunity for a full and fair hearing under the well-established procedures of the California Administrative Procedures Act.

It should also be noted that it was within the clear contemplation of the contracting parties that enforcement of the subject insurance policies would likely occur in a foreign jurisdiction such as California. Many of the subject insurance policies issued by the petitioner insurance companies

expressly agreed to cover the insured worldwide (obviously encompassing enforcement in California). Some even had a clause permitting changes of residence and travel throughout the world, and all policies had implicit in their terms a promise to pay the policy benefits wherever the insured or his/her beneficiary resided at the time a claim was to be made. In such circumstances there can be no doubt that application of HVIRA to the petitioners, each doing business in California, is entirely fair and is wholly consistent with due process. *Clay v. Suns Ins. Office, Ltd.*, 377 U.S. 179 (1980).

The application of California law to the actions of businesses operating within its borders is eminently fair. The purpose of HVIRA is simply to set out reasonable conditions, protective of the interests of California residents, under which foreign-based insurance companies must produce information in order to lawfully continue to conduct business in California. *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648 (1981).

In the instant case, HVIRA does no more than regulate conduct taking place in the state, empowering California to legitimately exercise its authority over the companies in question. The companies' presence in California gives the state an interest in regulating the companies' insurance obligations to the extent that California residents are affected. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 317-318 (1981). Each of the involved companies is licensed and doing business in California, the class of people to be benefitted are California residents, the insurance contracts contemplated enforcement worldwide, and all licensing decisions are made with proper administrative hearings and procedural safeguards. With all these

factors in place, the ability of California to fashion reasonable remedial relief for its Holocaust survivor citizens is more than fair. If California is unable to act despite these protections, then the delays engendered by a granting of the petition for certiorari will simply lead to more tragedies.

B. Enforcement of HVIRA Does Not Interfere With the Foreign Affairs Powers of the United States

HVIRA regulates only private companies licensed to operate in California. It neither has an impact on, nor purports to have an impact on, any foreign government. Furthermore, despite the passage of HVIRA and the rulings of the Ninth Circuit upholding its terms, all international settlement processes continue to operate without interference. In fact, Bet Tzedek clients submitted claims to ICHEIC and to the German Foundation. These procedures are marching forward, unabated by the actions occurring in California. In truth, Bet Tzedek clients need the benefits of the HVIRA disclosure provisions in order to effectively participate in the ICHEIC claims process or otherwise assert rightful claims. Consequently, the enactment of HVIRA demonstrably has had no effect on the exercise of the United States' foreign affairs activities.

C. HVIRA Is Markedly Different in Substance from a Florida Statute and, Consequently, There Is no Conflict Among the Circuits

In Florida, a statute was passed which purported to exercise the authority to require European insurance

companies, even those not doing business in the state, to pay claims in a timely manner. In contrast, the Ninth Circuit has twice held that HVIRA is a reporting statute only, the aim of which is not to force the payment of claims, but simply to regulate the conduct of businesses licensed to operate in California. Consequently, the decision in *Gerling Global Reinsurance Corp. of America v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001) is not relevant here and there is no conflict between the circuits.

Because it is highly unlikely that HVIRA constitutes a deprivation of due process, interferes with foreign affairs, or would stand in conflict with other circuits, the legitimate interest of California in protecting its citizens stands paramount. The state has an overriding interest in protecting its citizens from companies whose out-of-state business practices call into question a company's integrity and fitness to serve the people of California. More specifically, with one of the largest populations of Holocaust survivors anywhere in the world, California has long demonstrated a deep interest in assuring that this unique community of citizens is treated fairly. Providing truthful information to people who have waited more than 50 years for nothing more than that is a legitimate, if not an overriding, state interest. It is an interest that far outweighs the dubious legal claims of companies whose goal seems to be keeping the truth away from those whose lives have been immeasurably affected by the withholding of simple facts.

IV. CONCLUSION

California has continued to be a national leader in exercising its sovereignty on behalf of the poor and powerless. HVIRA is an example of the way in which the people

of the state of California have established admirable public policy that seeks to assist thousands of citizens in their frustratingly long search for truth and justice. As Holocaust survivors near the end of their days, many are sick and many are poor. They share a common bond of tragedy and powerlessness. Today, California seeks merely to empower the most voiceless, giving them the chance to finally find truths and justice.

With all the protections afforded by the Constitution, California has balanced the needs of its most vulnerable and unique citizens with the respect due its business community. The result is HVIRA, a statute whose regulatory goal is the disclosure of truthful information. The measure protects the due process rights of the affected companies while effectively exercising the state's regulatory responsibilities. Consequently, the harm to a community of needy clients that will potentially result from a further delay in implementing HVIRA far outweighs any manufactured need to revisit the well-reasoned opinion from the court below.

On behalf of its elderly, indigent and long-suffering Holocaust survivor clients, *amicus curiae* Bet Tzedek, "The House of Justice", respectfully requests that the subject petition for writ of certiorari be denied.

Respectfuly submitted,

DAVID A. LASH

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No. 02-722

IN THE
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AMERICAN INSURANCE ASSOCIATION, *et al.*,
Petitioners,

v.

HENRY W. LOW, IN HIS CAPACITY AS COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF GOVERNMENT OF SWITZERLAND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF GOVERNMENT OF SWITZERLAND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37 of the Rules of this Court, the Government of Switzerland respectfully submits this brief as *amicus curiae* in support of the Petition for a Writ of Certiorari.[1] Counsel for petitioners and respondent consented to the filing of this brief.

[1] Counsel for the Government of Switzerland prepared this brief in its entirety, and no person or entity other than the Government of Switzerland and its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE AMICUS CURIAE

The issue of payments by corporations to resolve outstanding World War II era claims has become prominent in recent years, arising simultaneously with major reevaluations by many countries of the conduct of their governments, industries, and general populations during the World War II era. The role of civil actions in the United States courts in this process has itself been highly controversial.

Switzerland was the first country to deal in a comprehensive manner with the issue of corporate payments to resolve World War II era claims. On August 9, 2000, the U.S. District Court for the Eastern District of New York formally approved a settlement agreement among Swiss companies, class action plaintiffs, and the World Jewish Restitution Organization. The settlement agreement, which includes payment to the plaintiffs of $1.25 billion, by its terms provides for complete legal and material resolution of Holocaust-related issues for all of Switzerland, with the exception of three Swiss insurance companies. Meanwhile, the Government of Switzerland has endorsed the work of the International Commission on Holocaust Era Insurance Claims, an international organization formed to address unpaid insurance claims.

The Government of Switzerland has grave concerns that the decision of the U.S. Court of Appeals for the Ninth Circuit, by encouraging the State of California and other States to pursue their own unilateral agendas, may undermine the very considerable efforts that have been made by Swiss industry, major Jewish organizations, and the Swiss and United States governments to achieve a comprehensive resolution of a difficult and complex international issue. In addition, the Government of Switzerland has a vital interest in the preservation of the integrity of the laws and legal system of Switzerland, and believes that the decision of the Ninth Circuit must be reversed to prevent the California statute from

requiring the production of confidential information from Switzerland in a manner inconsistent with Swiss law and sovereignty.

Accordingly, the Government of Switzerland submits this brief to explain its views on why the California statute, if applied, will interfere with Swiss-United States relations.

SUMMARY OF ARGUMENT

The Holocaust Victim Insurance Relief Act of 1999 ("HVIRA"), Cal. Ins. Code §§ 13900-13807, is a California statute that would impose onerous reporting burdens on foreign companies, including Swiss companies, relating to records of World War II era transactions that took place over fifty years ago in foreign countries with persons who were not United States citizens or present in the United States at the time of those transactions. The purpose of the statute is to facilitate the initiation of civil lawsuits in California against foreign companies.

On February 7, 2001, the U.S. Court of Appeals for the Ninth Circuit reversed the holdings of the U.S. District Court for the Eastern District of California and held that the HVIRA is consistent with the Foreign Commerce Clause and does not infringe upon the foreign affairs power of the Executive Branch. On remand, the district court issued a permanent injunction enjoining enforcement of the HRIVA on the grounds that mandating license suspension for non-performance of impossible tasks deprived the petitioners of a protected property interest without due process of law. On July 15, 2002, the Ninth Circuit again reversed the district court, distinguished the decision of the U.S. Court of Appeals for the Eleventh Circuit on a similar statute in *Gerling Global Rein. Corp. v. Gallagher*, and upheld the HRIVA against the petitioners' constitutional claims.

Contrary to the Ninth Circuit's holdings, the HVIRA, if applied, will have a significant effect on the foreign relations of the United States with Switzerland. The HVIRA is

inconsistent with the August 9, 2000 settlement of class action claims against Swiss interests in the U.S. District Court for the Eastern District of New York, as well as with a joint Swiss-United States undertaking on Holocaust-related claims. In addition, by requiring Swiss companies to provide confidential information from Switzerland, the HVIRA would compel the violation of Swiss sovereignty and Swiss privacy laws. Finally, the Ninth Circuit's decision conflicts with rulings of this Court and the U.S. Courts of Appeals for the First and Eleventh Circuits.

These factors demonstrate that this case is deserving of immediate consideration by this Court.

ARGUMENT

A. The HVIRA Is Inconsistent With a Pre-Existing Settlement Agreement Between Swiss Industry, Class Action Plaintiffs, and the World Jewish Restitution Organization That Is Supported by the Swiss and United States Governments

On August 9, 2000, the U.S. District Court for the Eastern District of New York formally approved a settlement agreement among Swiss companies, class action plaintiffs, and the World Jewish Restitution Organization regarding World War II era claims. *In re: Holocaust Victims Assets Litigation*, 96 Civ. 4849, 2000 U.S. Dist. Lexis 15644 (E.D.N.Y. Aug. 9, 2000). The settlement agreement, which includes payment to the class action plaintiffs of $1.25 billion, by its terms provides for complete legal and material resolution of Holocaust-related issues for all of Switzerland, with the express exception of three Swiss insurers.[2]

The Swiss and United States federal governments have formed a Joint Economic Commission ("JEC"), comprised of

[2] The three exempted insurers are Basler Lebensversicherungs-Gesellschaft, Zurich Lebensversicherungs-Gesellschaft, and Winterthur Lebensversicherungs-Gesellschaft.

senior representatives of the two governments. In a Joint Statement issued through the JEC on January 29, 2000, the Swiss and United States governments reaffirmed their determination to maintain open markets and to promote bilateral market access for trade, finance and investment, including the insurance industry. With regard to Holocaust-related matters, the JEC commended Switzerland's ongoing efforts and specifically:

> welcom[ed] the settlement that was achieved in In Re Holocaust Victim Assets Litigation . . . which . . . when approved will be recognized by all interested parties as complete legal and material resolution of Holocaust related issues for all of the Swiss economy . . . and for the Swiss government.

ER 2384-85.[3]

The application of the HVIRA to Swiss companies (other than the three specifically exempted from the settlement) would interfere with the settlement agreement's release of the Swiss economy and would be inconsistent with Swiss and United States government policy supporting that settlement.

B. The HVIRA Conflicts With a Joint Endorsement of the International Commission on Holocaust Era Insurance Claims by the Swiss and United States Governments

The JEC's January 29, 2000 Joint Statement specifically addressed the issue of insurance claims by stating that the two governments:

> further welcom[ed] the ongoing constructive discussions in the framework of the International Commission on Holocaust Era Insurance Claims ... on unpaid policies of European insurance

[3] Citations to "ER" refer to the Excerpts of Record in the appeal of the preliminary injunction to the Ninth Circuit.

> companies dating from [the World War II] period, as an appropriate forum for resolving Holocaust related issues for those three Swiss insurance companies not [released] by the Swiss settlement.

ER 2385.

In the Action Plan annexed to the Joint Statement, the United States Government pledged to "call on State insurance Commissioners and State legislative bodies to refrain from taking unwarranted investigative initiatives or from threatening or actually using sanctions against Swiss insurers." ER 2390.

The JEC Joint Statement and the associated United States Government assurances are of great importance to Switzerland and Swiss industry, and accordingly the Government of Switzerland has expressed concern to the United States Government and the United States courts about the HVIRA on a number of occasions. For example, on April 6, 2000, the Government of Switzerland presented to the United States Government an Aide-Mémoire expressing its opinion that state laws such as the HVIRA would violate Swiss sovereignty and international law. App., *infra*, A-1. On June 2, 2000, the Government of Switzerland sent its views on the HVIRA directly to the district court. ER 2375. On August 9, 2000, the Government of Switzerland presented a diplomatic note to the United States Government regarding this case, in which it requested that the United States Government submit a brief as *amicus curiae* to the Ninth Circuit re-affirming the view that State legislative bodies should refrain from threatening or imposing sanctions against Swiss insurers. App., *infra*, B-1. The Government of Switzerland later submitted a brief as *amicus curiae* to the Ninth Circuit in support of the Petitioners' request for a rehearing *en banc* before the case was remanded to the district court.

The Government of Switzerland is particularly concerned that actions taken by the State of California under

the HVIRA will jeopardize the work of the International Commission on Holocaust Era Insurance Claims, which was formed to address issues of unpaid World War II era insurance claims. In the view of the Government of Switzerland, that commission is the most effective and expeditious vehicle for resolving unreceived and as yet unsettled insurance claims from the World War II era that are not already covered by the settlement agreement discussed above.

C. The HVIRA Would Require Swiss Companies to Violate Swiss Law

California lacks jurisdiction, as that concept is commonly understood in international law, to regulate foreign companies with respect to transactions that took place in foreign countries with persons who were not United States citizens or present in the United States at the time of those transactions.[4] In the absence of a genuine connection between the issues involved and United States jurisdiction, the enforcement of the HVIRA against insurance companies headquartered in Switzerland would violate international law and Swiss sovereignty. Furthermore, such enforcement would result in conflicting requirements imposed on the companies concerned to the extent that compliance with the California legislation would require a violation of the applicable Swiss privacy laws, resulting in interference with the Swiss legal system.[5]

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[4] *See, e.g.*, Restatement (Third) of the Foreign Relations Law of the United States (1987) § 403 ("a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.").

[5] For example, Article 273 of the Swiss Penal Code prohibits persons in Switzerland from releasing to foreign governments confidential business information relating to third parties, unless certain procedures are followed within Switzerland that ensure that the rights of third parties are appropriately protected. The California statute does not allow for the application of this Swiss law.

In the view of the Government of Switzerland, the HVIRA bears no genuine relation to the regulation of the provision of insurance services in California, but rather is designed to demonstrate that the state of California disapproves of the international cooperative actions taken to facilitate resolution of Holocaust era claims. Especially under these circumstances, the HVIRA's extraterritorial reach cannot be justified.

D. The Ninth Circuit's Decision Conflicts with Holdings of this Court and the U.S. Courts of Appeals for the First and Eleventh Circuits

The Ninth Circuit's decision is inconsistent with holdings of this Court and other Courts of Appeals on the Commerce Clause, the foreign affairs powers of the Executive Branch and the requirements of due process.

In its initial ruling, the Ninth Circuit made the following comment on the January 29, 2000 Joint Statement of the JEC:

> But even if we were to assume that a conflict exists between the Holocaust Act and the Swiss-US Joint Statement with regard to seeking information from Swiss insurers, Congress' action controls in this instance. . . . [A]s noted, the Swiss-US Joint Statement is not a treaty, and preemption is not an issue here. Plaintiffs' argument that a "policy interest" found in an executive branch "Joint Statement" creating an Economic Commission trumps Congress' express constitutional authority to regulate foreign commerce is incorrect.

Petition for Certiorari App. 54a-55a (footnotes omitted).

There is no dispute that Congress has the authority to regulate foreign commerce, but Congress has not enacted any statute that preempts or otherwise restricts the ability of the Executive Branch to engage in negotiations with Switzerland or other foreign countries regarding resolution of Holocaust-related claims. The interpretation by the Ninth Circuit seems

to suggest that, absent the implementation of a formal treaty, the Executive Branch lacks any foreign affairs power worthy of respect by the courts. Such a restrictive interpretation of the foreign affairs authority of the Executive Branch, if allowed to stand, would have significant consequences for the ability of the federal government to interact with foreign nations.

Although the Ninth Circuit recognized that the Supreme Court's decision in *Zschernig v. Miller*, 389 U.S. 429 (1968), held that a state may not intrude on the federal government's foreign affairs power, it declined to apply that decision. The Ninth Circuit's ruling also is inconsistent with the recent holding of the U.S. Court of Appeals for the First Circuit on the foreign affairs power in *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 49-59 (1st Cir. 1999), *aff'd on other grounds sub nom., Crosby v. National Foreign Trade Council*, 120 S. Ct. 2228 (2000).

Finally, the Ninth Circuit's ruling conflicts with the Eleventh Circuit's decision in *Gerling Global Reins. Corp. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001), which invalidated Florida's Holocaust Victims Insurance Act. Like the HRIVA, the Florida statute imposed reporting requirements on the Florida affiliates of European insurers that issued policies during the Holocaust to assist in the collection of World War II era claims. The Eleventh Circuit held that the Florida statute violated due process limits on Florida's legislative jurisdiction. Notwithstanding the Ninth Circuit's attempt to distinguish *Gallagher*, the identical facts and issues presented in these two cases – and their divergent results – further demonstrate the need for clarification of the law.

In the view of the Government of Switzerland, the totality of the circumstances plainly demonstrates the necessity for this Court to review and reverse the ruling below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 12, 2002

APPENDICES

APPENDIX A

AIDE MÉMOIRE

Several US States - inter alia Florida, California and Washington State - have enacted special legislation in the context of unrecovered insurance policies dating from the World War II period. These pieces of legislation require insurance companies doing business in the States concerned to provide comprehensive information on individual insurance policies under the threat of severe penalties, including the suspension of the companies' business license. Considering the clearly extraterritorial scope of these laws, their enforcement against insurance companies headquartered in Switzerland can be considered a violation of international law and Swiss sovereignty, which is liable to result in conflicting requirements imposed on the companies concerned to the extent that full compliance with the special State legislation would most likely imply a violation of applicable Swiss penal and data protection laws.

The Swiss Government is concerned about this situation and the renewed threat of sanctions and administrative harassment in a number of US States against European insurance companies, including Swiss companies. It considers that such threats or the actual use of sanctions, on the basis of potentially discriminatory and otherwise legally contestable State legislations, is in contradiction with the spirit of cooperation that the Swiss and US governments have reaffirmed at Davos and could strain the bilateral relations between Switzerland and the United States. Moreover, such threats or sanctions are completely unjustified as well as counter-productive in the light of the Swiss Settlement Agreement as well as the cooperative attitude of the Swiss insurance companies concerned.

The Swiss Government holds the view that this issue needs to be promptly addressed by the U.S. Government.

APPENDIX B

EMBASSY OF SWITZERLAND

The Embassy of Switzerland presents its compliments to the United States Department of State and has the honor of requesting its assistance in relation to the case of Winterthur International America Insurance Company, et al. v. Chuck Quackenbush, Insurance Commissioner for the State of California (Case No. CIV. S-00-779 [JFM]), in which the California Holocaust Victim Insurance Relief Act (the "California HVIRA") is being challenged by several insurers that do business in the State of California.

The California HVIRA purports to impose obligations on Swiss and other foreign companies "related" to U.S. companies, notwithstanding the fact that those companies are not engaged in business in California or indeed in the United States. It is the understanding of the Government of Switzerland that if the related Swiss companies do not comply with the directives of the California Insurance Commissioner under the HVIRA, their U.S. affiliated companies could be sanctioned and lose their licenses to conduct business in California.

Because of the extraterritorial scope of this legislation and the absence of a genuine connection between the issues involved and U.S. jurisdiction, its enforcement against insurance companies headquartered in Switzerland would violate international law and Swiss sovereignty. Furthermore, such enforcement would result in the imposition of conflicting requirements on the companies concerned to the extent that compliance with the California legislation would require a violation of the applicable Swiss penal and data protection

laws. The Government of Switzerland is concerned about potential attempts to interfere with the Swiss legal system.

The Government of Switzerland is also concerned that enforcement of this legislation would interfere with the Class Action Settlement Agreement reached in In Re Holocaust Victim Assets Litigation ("Swiss Settlement"). The Swiss Settlement by its terms provides for complete legal and material resolution of Holocaust-related issues for all of Switzerland, with the exception of three Swiss insurers which are involved in separate lawsuits. The California HVIRA conflicts with the Swiss Settlement's release of all other Swiss insurance companies and therefore is inconsistent with United States and Swiss government policies supporting the Settlement.

In addition, the issues referred to in the California HVIRA have been specifically addressed in the framework of the Joint Economic Commission ("JEC") recently established by our governments. A Joint Statement issued on the occasion of the inaugural meeting of the JEC specifically "welcom[ed] the settlement that was achieved in In Re Holocaust Victim Assets Litigation . . . which . . . , when approved will be recognized by all interested parties as complete legal and material resolution of Holocaust related issues for all of the Swiss economy [including the banking, insurance and manufacturing sectors] . . . and for the Swiss government." The JEC "further welcom[ed] the ongoing constructive discussions in the framework of the International Commission on Holocaust Era Insurance Claims ("Eagleburger Commission") on unpaid policies of European insurance companies dating from [the World War II] period, as an appropriate forum for resolving Holocaust related issues for those three Swiss insurance companies not [released] by the Swiss settlement." The JEC stated that it would "address issues related to potentially disruptive and counterproductive effects of investigative initiatives or the threat or actual use of sanctions on a sub-federal level against insurers, including

those that are part of the Swiss settlement or that are participants in the Eagleburger Commission."

In the Action Plan annexed to the Joint Statement, the U.S. Government pledged to "call on the U.S. State insurance Commissioners and State legislative bodies to refrain from taking unwarranted investigative initiatives or from threatening or actually using sanctions against Swiss insurers."

The Government of Switzerland has on several recent occasions expressed concern to the U.S. Government about State actions related to Holocaust insurance issues. Most recently, on April 6, 2000, the Government of Switzerland presented to the U.S. Government an Aide-Mémoire requesting prompt attention to this issue and expressing concern that such laws as the California HVIRA violate Swiss sovereignty and international law and may cause involved Swiss insurance companies to violate Swiss laws. The Government of Switzerland further objected to laws such as the California HVIRA on the grounds that they are potentially discriminatory against Swiss financial industries and a potential cause of strain on relations between the two countries. The Aide-Mémoire pointed out that laws such as the California HVIRA are counter-productive in light of the efforts and cooperative attitude of Swiss insurance companies in this matter.

Consistent with our understanding of the Department of State's policy of encouraging foreign governments to communicate directly with the United States Courts, the Government of Switzerland attempted to submit its views on this matter in a letter dated June 2, 2000 to the federal district court in which the case is being heard. The Embassy of Switzerland has learned, however, that on July 31, 2000, the court stated that it would not accept submission of the letter for procedural reasons. The Embassy therefore requests that the Department of State forward a copy of this note to the court on its behalf.

The Government of Switzerland is informed that a preliminary decision of the district court imposing a preliminary injunction against enforcement of the California HVIRA is currently pending before the Court of Appeals for the Ninth Circuit. The Government of Switzerland hereby requests that the United States Government make a submssion to the Court of Appeals, re-affirming the position of the Joint Economic Commission that the International Commission on Holocaust Era Insurance Claims is the appropriate forum for resolving remaining pertinent issues and that State authorities should refrain from taking unwarranted investigative initiatives or from threatening or imposing sanctions against Swiss insurers that would be liable to cause serious, irreparable damage to the companies concerned.

The Embassy of Switzerland avails itself of this opportunity to thank the United States Department of State for its cooperation and to renew the assurances of its highest consideration.

Washington, D.C., August 9, 2000

United States Department of State
Washington, D.C.

Supreme Court, U.S.
FILED

FEB 24 2003

OFFICE OF THE CLERK

(10)

No. 02-722

In the Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, AMERICAN RE-INSURANCE COMPANY, *ET AL.*,

Petitioners,

v.

JOHN GARAMENDI, IN HIS CAPACITY AS COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 7, 2002
CERTIORARI GRANTED JANUARY 10, 2003

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E. Declaration of Arthur P. Stern (April 25, 2000) 29

F. Declaration of Leslie Tick (May 3, 2000) 32

G. Statement by Deputy Treasury Secretary Stuart E. Eizenstat (June 12, 2000) 50

H. Letter from National Security Adviser Samuel R. Berger and Counsel to the President Beth Nolan to National Security Assistant Michael Steiner (June 16, 2000) 52

I. Letter from National Security Assistant Michael Steiner to National Security Adviser Samuel [R]. Berger (July 5, 2000) 55

J. Deputy Secretary of the Treasury Stuart E Eizenstat, Remarks at the 12th and Concluding Plenary on the German Foundation, Berlin, Germany (July 17, 2000) 57

K. Harry Schweid, *Armitage Speaks on Holocaust Claims* (AP July 18, 2001) 69

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NOTICE

The following items have been omitted in printing this Joint Appendix because they appear on the following pages in the printed Appendix to the Petition for a Writ of Certiorari:

A. Opinion of the United States Court of Appeals for the Ninth Circuit, filed July 15, 2002 (amended September 9, 2002) 1a

B. Opinion of the United States Court of Appeals for the Ninth Circuit, filed February 7, 2001 ..... 34a

C. Opinion of the United States District Court for the Eastern District of California, filed October 2, 2001. 61a

D. Opinion of the United States District Court for the Eastern District of California, filed June 9, 2000 ... 85a

F. Letter from Deputy Treasury Secretary Stuart E. Eizenstat to the Honorable Gray Davis (November 30, 1999) 123a

G. Deputy Treasury Secretary Stuart E. Eizenstat, Special Representative of the Secretary of State and the President on Holocaust-Related Issues, Senate Foreign Relations Committee (April 5, 2000) 126a

H. The Executive Agreement on the German Foundation (July 17, 2000) 153a

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I. Joint Statement by President George W. Bush and Chancellor Gerhard Schroeder on a Transatlantic Vision for the 21st Century (March 29, 2001) 169a

J. Statement by Ambassador Randolph M. Bell, Special Envoy for Holocaust Issues, U.S. Department of State, Washington, DC, to the U.S. House of Representatives, Committee on Government Reform, Subcommittee on Governmental Efficiency, Financial Management and Intergovernmental Relations (September 24, 2002) 174a

The following items have been omitted in printing this Joint Appendix because they appear on the following pages in the printed Appendix to the Respondent's Brief in Opposition:

D. Testimony of Leslie Tick, California Department of Insurance, United States House of Representatives Government Reform['s] Subcommittee on Governmental Efficiency, Financial Management and International Relations (September 24, 2002) 23

E. Statement of Representative Henry A. Waxman, Ranking Minority Member, Committee on Government Reform, at the Subcommittee on Governmental Efficiency, Financial Management and International Relations Hearing on H.R. 2963 (September 24, 2002) 31

F. Prepared Statement of David S. Waldman, Vice President-Chief Operations Counsel, MONY Life Insurance Company, for the House Committee on the Government Reform's Sub-committee on Government Efficiency, Financial Management and

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G. Order of U.S. Court of Appeals for the Ninth Circuit denying petition for rehearing and petition for rehearing *en banc* filed on March 29, 2001, in *Gerling Global Reinsurance Corp. of American, et al. v. Low*, No. 00-16163, *et al.* (*Gerling I*) 42

H. Cover page and pages 6-9 of Brief for Amicus Curiae the United States of America served on or about September 20, 2000, in *Gerling Global Reinsurance Corp. of American, et al. v. Low*, No. 00-16163, *et al.* (*Gerling I*) 44

I. Cover page and page 11 of Brief for Amicus Curiae the United States of America served on or about March 9, 2001, in *Gerling Global Reinsurance Corp. of American, et al. v. Low*, No. 00-16163, *et al.* (*Gerling I*) 50

J. An unofficial translation of the Bundestag resolution, adopted on May 30, 2001, dealing with the German Foundation; obtained from the United States Department of State 53

K. Cover page and page 6 of Motion of the Federal Republic of Germany for Leave to File Brief Amicus Curiae and Brief Amicus Curiae supporting affirmance of summary judgment for plaintiffs-appellees/cross-appellants, served on or about March 15, 2001, in *Gerling Global Reinsurance Corp. of American, et al. v. Low*, No. 01-17023, *et al.* (*Gerling II*) 55

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L. Investigative Subpoena for Records issued In the Matter of Holocaust Victims Insurance Enforcement Proceeding Case No. 31393-99-SC 58

N. Cover page and excerpt from pages 41-42 of Memorandum of Law in Support of Azzicurazioni Generali S.p.A.'s Motion to Dismiss, Strike, and/or for Judgment on All Plaintiffs' Claims, on Choice of Law and Related Grounds, dated November 15, 2002, in *In re: Assicurazioni Generali S.p.A. Holocaust Insurance Litigation* (S.D.N.Y. 2002) (No. MDL 1374 M 21-89 (MBM)) 71

APPENDIX A

UNITED STATE DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

Nos. 00-CV-506, 00-CV-613,
00-CV-779, 00-CV-875

GERLING GLOBAL REINSURANCE CORP.
OF AMERICA, *ET AL.*,

Plaintiffs,

v.

CHUCK QUACKENBUSH, IN HIS CAPACITY AS COMMISSIONER
OF INSURANCE FOR THE STATE OF CALIFORNIA,

Defendant.

RELEVANT DOCKET ENTRIES*

DATE	#	DOCKET ENTRY
		[entries from the Docket in 00-CV-506 (Gerling)]
3/9/00	1	COMPLAINT by the Gerling plaintiffs.
3/9/00	7	NOTICE OF MOTION AND MOTION for preliminary injunction by plaintiffs.
3/9/00	8	MEMORANDUM OF POINTS AND AUTHORITIES by plaintiffs in support of motion for preliminary injunction.

* For the Court's convenience, the docket entries have been revised and reworded to reflect more clearly the actual entries in the district court's docket. Separate dockets were maintained for the four cases filed by petitioners and Gerling until October 16, 2000, when the district court ordered the cases consolidated.

3/27/00	20	NOTICE OF MOTION AND MOTION to dismiss by defendant.
3/27/00	21	MEMORANDUM OF POINTS AND AUTHORITIES by defendant in support of motion to dismiss.
3/27/00	22	DECLARATION of Frank Kaplan in support of motion to dismiss.
4/10/00	29	MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION by plaintiffs to motion to dismiss by defendant.
4/10/00	30	NOTICE OF COUNTER-MOTION AND COUNTER-MOTION for summary judgment by plaintiffs.
4/10/00	32	MEMORANDUM OF POINTS AND AUTHORITIES by plaintiffs in support of counter-motion for summary judgment.
5/8/00	55	RESPONSE by defendant to motion for summary judgment by plaintiffs, and to motion for preliminary injunction by plaintiffs.
5/8/00	57	OBJECTIONS by defendant to evidence submitted by plaintiffs in support of motions for summary judgment and preliminary injunction.
5/8/00	60	DECLARATIONS in opposition to motion for preliminary injunction and motion for summary judgment.
5/15/00	73	BRIEF of the Federal Republic of Germany as amicus curiae.
5/17/00	77	OPPOSITION by defendant to motion for summary judgment by plaintiffs, and to motion for preliminary injunction by plaintiffs.

5/22/00	78	REPLY BRIEF by defendant in support of motion to dismiss complaint.
5/22/00	80	REPLY by plaintiffs in support of counter-motion for summary judgment.
5/22/00	85	RESPONSE by defendant to brief of Federal Republic of Germany as amicus curiae.
6/2/00	92	NOTICE OF MOTION AND MOTION to file amicus brief by the People of the State of California.
6/6/00	94	MINUTES of hearing * * *: motion to file amicus brief by the People of the State of California SUBMITTED, motion to dismiss by defendant SUBMITTED, motion for preliminary injunction by plaintiffs SUBMITTED, motion for summary judgment by plaintiffs SUBMITTED; order to be prepared by the court.
6/9/00	95	ORDER that motions for leave of court to file amicus curiae briefs are GRANTED.
6/9/00	96	ORDER that defendant's motion to dismiss plaintiffs' constitutional challenges to Cal. Ins. Code sections 13800-13807 and to dismiss plaintiff American Ins. Association is DENIED; it is further ordered that defendant's motion to dismiss Gerling's constitutional challenges to Cal. Code of Civil Procedure section 354.5 and Cal. Ins. Code section 790.15 is GRANTED, without prejudice.

6/9/00	97	MEMORANDUM AND ORDER that plaintiffs' motions for a preliminary injunction are GRANTED; pending final judgment in these actions, defendant is enjoined from enforcing the provisions of the Holocaust Victims Insurance Relief Act.
6/14/00	98	INTERLOCUTORY APPEAL by defendant.
10/16/00	111	STIPULATION AND ORDER that case 00-CV-506 is CONSOLIDATED with cases 00-CV-613, 00-CV-779, 00-CV-875.
4/9/01	123	CERTIFIED COPY of judgment from 9th Circuit: the decision of the District Court is AFFIRMED and REMANDED for further proceedings.
4/16/01	125	NOTICE OF MOTION by defendant for summary judgment or, in the alternative, for summary adjudication.
4/16/01	126	MEMORANDUM OF POINTS AND AUTHORITIES by defendant in support of motion for summary judgment or, in the alternative, for summary adjudication.
4/16/01	127	STATEMENT OF UNDISPUTED FACTS by defendant in support of motion for summary judgment or, in the alternative, for summary adjudication.
8/3/01	170	NOTICE OF MOTION AND MOTION for summary judgment by all plaintiffs that the HVIRA is unconstitutional under the Due Process Clause.
8/3/01	171	MEMORANDUM OF POINTS AND AUTHORITIES by all plaintiffs in SUPPORT of motion for summary judgment that the HVIRA is unconstitutional under the Due Process Clause.

8/3/01	172	STATEMENT by all plaintiffs of Undisputed Facts in support of motion for summary judgment.
8/3/01	173	DECLARATIONS of all Plaintiffs in support of motion for summary judgment that the HVIRA is unconstitutional under the Due Process Clause.
8/3/01	176	NOTICE OF MOTION by defendant for summary judgment or, in the alternative, summary adjudication, and to dissolve or vacate preliminary injunction.
8/3/01	177	STATEMENT by defendant Harry Low of Undisputed Facts in support of motion for summary judgment * * *.
8/3/01	178	MEMORANDUM OF POINTS AND AUTHORITIES by defendant in SUPPORT of motion for summary judgment or, in the alternative, summary adjudication, and motion to dissolve or vacate preliminary injunction.
8/3/01	180	SUPPLEMENTAL DECLARATION of Leslie Tick and DECLARATION of Frank Kaplan in support of motions for summary judgment, and to dissolve or vacate preliminary injunction.
8/17/01	190	OPPOSITION by plaintiff Generali to motion for summary judgment or, in the alternative, for summary adjudication by defendant.

8/17/01	191	STATEMENT by plaintiff Generali of Undisputed facts in support of its opposition to the Defendant's motion for summary judgment.
8/17/01	192	DECLARATION of Christopher Carnicelli of Generali in opposition to the defendant's motion for summary judgment.
8/17/01	193	MEMORANDUM OF POINTS AND AUTHORITIES by defendant in opposition to plaintiffs' motion for summary judgment that the HVIRA is unconstitutional under the Due Process Clause.
8/17/01	195	OPPOSITION by plaintiffs to defendant's motion for summary judgment or, in the alternative, for summary adjudication.
8/17/01	196	DECLARATIONS of Dr. Hans Peter Bull, Paul M. Schwartz and Yolanta Goldstein; supplemental declaration of Frank Kaplan and second supplemental declaration of Leslie Tick in opposition to plaintiffs' motion for summary judgment.
8/17/01	197	RESPONSE by defendant to plaintiffs' statement of undisputed facts.
8/17/01	198	MEMORANDUM OF POINTS AND AUTHORITIES by all plaintiffs in OPPOSITION to defendant's motion for summary judgment or, in the alternative, summary adjudication.
8/17/01	199	JOINT RESPONSE by all plaintiffs to defendant's statement of undisputed facts regarding motion for summary judgment.
8/17/01	200	MEMORANDUM OF POINTS AND AUTHORITIES by all plaintiffs in

		OPPOSITION to defendant's motion for summary judgment or, in the alternative summary, adjudication.
8/17/01	203	MEMORANDUM OF POINTS AND AUTHORITIES of Winterthur plaintiffs in OPPOSITION to motion for summary judgment or, in the alternative, summary adjudication by defendant Harry Low.
8/17/01	205	DECLARATION of Peter Simshauser in support of Generali's opposition to the defendant's motion for summary judgment.
8/24/01	215	MEMORANDUM OF POINTS AND AUTHORITIES by defendant in SUPPORT of motion for summary judgment or, in the alternative, summary adjudication.
8/24/01	219	REPLY MEMORANDUM OF POINTS AND AUTHORITIES by plaintiffs in SUPPORT of motion for summary judgment that the HVIRA is unconstitutional under the Due Process Clause.
8/24/01	223	REPLY MEMORANDUM OF POINTS AND AUTHORITIES by Winterthur plaintiffs in SUPPORT of motion for summary judgment by all plaintiffs that the HVIRA is unconstitutional under the Due Process Clause.
9/4/01	234	HEARING on cross-motions for summary judgment.
9/7/01	235	TRANSCRIPT of hearing on cross-motions for summary judgment.
9/10/01	236	JOINT SUPPLEMENTAL BRIEF by plaintiffs.

9/10/01	237	DEFENDANT'S SUPPLEMENTAL brief.
10/2/01	238	ORDER that motion for summary judgment by all plaintiffs that the HVIRA is unconstitutional under the Due Process Clause is GRANTED; defendant is permanently enjoined from suspending the licenses of the plaintiffs to do business in California based on their failure to comply with the Holocaust Victims Insurance Relief Act and its accompanying regulations; the motion for summary judgment or, in the alternative, summary adjudication by defendant is DENIED.
10/2/01	239	JUDGMENT entered pursuant to order granting plaintiffs' motion for summary judgment.
10/10/01	240	NOTICE OF APPEAL by defendant.

[entries from the Docket in 00-CV-613 (AIA/AmRe)]

3/22/00	1	COMPLAINT for Declaratory and Injunctive Relief by AIA and AmRe.
3/22/00	4	NOTICE OF MOTION AND MOTION for preliminary injunction by plaintiffs.
3/22/00	5	MEMORANDUM OF POINTS AND AUTHORITIES in support of plaintiffs' motion for preliminary injunction.
3/22/00	7	DECLARATION of Jeffrey M. Klein in support of plaintiffs' motion for a preliminary injunction.
3/22/00	8	DECLARATION of Janet Kloenhamer in support of plaintiffs' motion for a preliminary injunction.

3/22/00	9	DECLARATION of Roger M. Singer in support of plaintiffs' motion for a preliminary injunction.
3/22/00	10	DECLARATION of Patrick J. Hughes in support of plaintiffs' motion for a preliminary injunction.
3/22/00	11	DECLARATION of Craig A. Berrington in support of plaintiffs' motion for a preliminary injunction.
3/22/00	12	DECLARATION of John J. Sullivan in support of plaintiffs' motion for a preliminary injunction.
4/7/00	20	NOTICE OF MOTION AND MOTION to dismiss by defendant.
4/7/00	21	MEMORANDUM OF POINTS AND AUTHORITIES by defendant in support of motion to dismiss.
4/7/00	22	DECLARATION of Frank Kaplan in support of motion to dismiss.
5/8/00	30	RESPONSE by plaintiffs to motion to dismiss by defendant.
5/8/00	37	RESPONSE by defendant to motion for preliminary injunction by plaintiffs.
5/8/00	38	DECLARATIONS in opposition to motion for preliminary injunction.
5/17/00	54	OPPOSITION by defendant to motion for preliminary injunction by plaintiffs.
5/22/00	56	REPLY brief by defendant in support of motion to dismiss.
5/22/00	58	REPLY DECLARATION of Frank Kaplan in support of motion to dismiss.

5/22/00	62	REPLY by plaintiffs in support of motion for preliminary injunction.

[entries from the Docket in 00-CV-779 (Winterthur)]

4/10/00	1	COMPLAINT for declaratory and injunctive relief by the Winterthur plaintiffs.
4/21/00	5	NOTICE OF MOTION AND MOTION to dismiss by defendant.
4/21/00	6	MEMORANDUM OF POINTS AND AUTHORITIES by defendant in support of motion to dismiss.
4/24/00	7	NOTICE OF MOTION AND MOTION for preliminary injunction by plaintiffs.
4/24/00	8	DECLARATIONS AND EXHIBITS in support of plaintiffs' motion for preliminary injunction.
4/24/00	9	DECLARATION of Lawrence S. Eagleburger in support of plaintiffs' motion for preliminary injunction.
5/2/00	17	AMENDED points and authorities in support of motion to dismiss complaint by defendant.
5/8/00	18	RESPONSE by plaintiffs to motion to dismiss by defendant.
5/8/00	20	RESPONSE by defendant to motion for preliminary injunction by plaintiffs.
5/8/00	21	APPENDIX of other authorities in opposition to plaintiffs' motion for preliminary injunction.
5/8/00	24	DECLARATIONS in opposition to motion for preliminary injunction.

5/17/00	30	OPPOSITION by defendant to motion for preliminary injunction by plaintiffs.
5/22/00	31	REPLY brief by defendant in support of motion to dismiss.
5/22/00	32	REPLY by plaintiffs in support of motion for preliminary injunction.

[entries from the Docket in 00-CV-875 (Generali)]

4/20/00	1	COMPLAINT for declaratory and injunctive relief by Generali.
4/20/00	4	MOTION for preliminary injunction by plaintiff.
4/20/00	5	MEMORANDUM OF POINTS AND AUTHORITIES by plaintiff in support of motion for preliminary injunction.
4/20/00	6	DECLARATION of Peter Simshauser in support of plaintiff's motion for preliminary injunction.
4/20/00	7	DECLARATION of Alberto Tiberini in support of plaintiff's motion for preliminary injunction.
5/8/00	17	RESPONSE by defendant to motion for preliminary injunction by plaintiff.
5/8/00	19	APPENDIX of other authorities in opposition to plaintiff's motion for preliminary injunction.
5/8/00	21	DECLARATIONS in opposition to motion for preliminary injunction.
5/17/00	27	OPPOSITION by defendant to motion for preliminary injunction by plaintiff.

5/22/00	29	REPLY memorandum by plaintiff in response to opposition to motion for preliminary injunction.
5/22/00	32	SUPPLEMENTAL declaration of Peter Simshauser in support of Generali's motion for a preliminary injunction.

APPENDIX B

UNITED STATE COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 00-16163, 00-16164, 00-16165, 00-16182
and No. 01-17023

GERLING GLOBAL REINSURANCE CORP.
OF AMERICAN, *ET AL.*,

Plaintiffs-Appellees,

v.

HARRY LOW, IN HIS CAPACITY AS COMMISSIONER OF
INSURANCE FOR THE STATE OF CALIFORNIA,

Defendant-Appellant.

RELEVANT DOCKET ENTRIES**

[entries from the Docket in 00-16163]

6/26/00	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL.
6/30/00	Filed Appellant Chuck Quackenbush's motion to consolidate; declaration of Andrew W. Stroud; and exhibits.

** For the Court's convenience, the docket entries have been revised and reworded to reflect more clearly the actual entries in the court of appeal's docket. The preliminary injunction appeals were docketed in No. 00-16163. The appeal of the permanent injunction was docketed in No. 01-17023.

7/6/00	Order: the Court, on its own motion, consolidates these four preliminary injunction appeals.
7/13/00	Filed Appellant's opening brief and excerpts of record.
7/13/00	Filed Appellant's motion for oral argument.
7/19/00	Filed Bet Tzedek Legal Services' motion for leave to file amicus curiae brief in support of Appellant.
7/19/00	Filed The People of the State of California's amicus curiae brief in support of Appellant.
8/25/00	Filed the Federal Republic of Germany's motion for leave to file amicus brief.
8/30/00	Received Winterthur International's brief and supplemental excerpts of record.
8/30/00	Received Gerling's brief and supplemental excerpts of record.
8/31/00	Received Generali's brief.
9/1/00	Received brief of American Insurance Ass'n and American Re-Insurance Company.
9/1/00	Filed The Chamber of Commerce of the United States and the Organization for International Investment's motion to file amicus curiae brief in support of Appellees.
9/1/00	Filed United States' motion to extend time to file amicus curiae brief.
9/7/00	Filed answering brief of Appellees American Insurance Ass'n and American Re-Insurance Company.

9/7/00	Filed Appellees Gerling's brief and supplemental excerpts of record.
9/7/00	Filed Appellees Winterthur International's answering brief and supplemental excerpts of record.
9/8/00	Filed Appellee Generali's brief.
9/21/00	Received Appellant Clark Kelso's reply brief.
9/28/00	Order: the * * * clerk shall amend the docket to reflect that Insurance Commissioner Harry Low is the Appellant in these consolidated appeals. The clerk shall also amend the docket to reflect that the United States is appearing as amicus curiae in these consolidated appeals. Appellant's motion to file an oversized reply brief is granted. The motion of amicus curiae the United States for enlargement of time to file an amicus brief and the motion to exceed the word count, are granted. Accordingly, the clerk shall file the brief of amicus curiae the United States.
9/28/00	Filed Appellant's reply brief.
10/3/00	Received Appellant's submission of new evidence.
12/6/00	Filed Amicus United States' motion for leave to participate in oral argument.
12/8/00	Order: The Appellees are to file a response to the Commissioner's request for submission of new evidence. The response is to be filed within 7 days of the date of this order and is not to exceed 5 pages in length. The United States' motion for leave to participate in oral argument and that it be allotted 5 minutes to present its oral argument is granted. The 5 minutes will be

in addition to the Appellant's and Appellees' allotted time of 20 minutes per side.

12/8/00 Order: * * * Bet Tzedek Legal Services' motion for leave to file an amicus curiae brief is granted. The brief tendered 7/19/00 is ordered filed. The Federal Republic of Germany's motion for leave to file an amicus curiae brief is granted. The brief tendered 8/25/00 is ordered filed. The Chamber of Commerce of the United States and the Organization for International Investment's motion for leave to file an amici curiae brief is granted. The brief tendered 9/1/00 is ordered filed.

12/15/00 Received response of Appellees to the Appellant's submission of new evidence.

12/22/00 Order: The Appellant's submission of new evidence, which we construe as a request that the court consider newly submitted evidence, is DENIED. The Appellees' request to consider new evidence contained in its response to the Commissioner's request is DENIED.

1/9/01 ARGUED AND SUBMITTED to Alfred T. GOODWIN, Susan P. GRABER, and Richard A. PAEZ, Circuit Judges.

2/7/01 FILED OPINION: Preliminary Injunction AFFIRMED and REMANDED for further proceedings.

2/21/01 Filed Appellees' petition for rehearing with suggestion for rehearing en banc.

2/28/01 Filed The Federal Republic of Germany's motion for leave to file brief of amicus curiae in support of petition for rehearing en banc.

3/1/01 Filed Government of Switzerland's motion for leave to file amicus curiae brief.

3/7/01 Order (Alfred T. GOODWIN, Susan P. GRABER, and Richard A. PAEZ, Circuit Judges): The Federal Republic of Germany's motion for leave to file brief of amicus curiae in support of petition for rehearing and suggestion for rehearing en banc is granted. The brief tendered 2/28/01 is ordered filed.

3/12/01 Order (Alfred T. GOODWIN, Susan P. GRABER, and Richard A. PAEZ, Circuit Judges): The Government of Switzerland's motion for leave to file an amicus curiae br is granted. The brief of amicus curiae Government of Switzerland Supporting Appellees' Petition for Rehearing En Banc tendered 3/1/01 is ordered filed.

3/12/01 Filed motion of the United States for leave to file brief as amicus curiae in support of petition for rehearing.

3/26/01 Order (Alfred T. GOODWIN, Susan P. GRABER, and Richard A. PAEZ, Circuit Judges): The motion of the United States for leave to file brief as amicus curiae in support of the petition for rehearing is granted. The brief for amicus curiae the United States in support of Rehearing En Banc tendered 3//12/01 is ordered filed.

3/29/01 Order (Alfred T. GOODWIN, Susan P. GRABER, and Richard A. PAEZ, Circuit Judges): The panel has voted to deny the petition for rehearing. The petition for rehearing and petition for rehearing en banc are DENIED.

4/6/01 MANDATE ISSUED.

7/2/01	Received notice from Supreme Court that a petition for certiorari was filed on 6/26/01.
2/4/02	Filed Supreme Court Order: The stipulation to dismiss the petition for writ of certiorari in the above-entitled case having been received by the office of the clerk and no fees due the clerk, the petition for a writ of certiorari is now hereby dismissed pursuant to Rule 45.1 of the Rules of this Court.

[entries from the Docket in 01-17023]

10/16/01	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL.
12/18/01	Order (GOODWIN, GRABER, and PAEZ, Circuit Judges): The panel accepts these cases as comeback cases. * * *
1/25/02	Filed Appellant Harry Low's first brief on cross-appeal and excerpts of record.
2/4/02	Filed People of the State of California ex rel. Bill Lockyer Attorney General of the State of California's amicus curiae brief in support of Appellant.
2/4/02	Received amicus curiae brief of Mike Kreidler, Insurance Commissioner of the State of Washington, in support of Appellant.
2/8/02	Filed motions of Amicus Mike Kreidler and Bet Tzedek Legal Services to file amicus curiae briefs.
2/12/02	Filed joint motion to consolidate appeals and retain briefing and argument schedule.
2/25/02	Order (Alfred T. GOODWIN, Susan P. GRABER, and Richard A. PAEZ, Circuit Judges): The joint motion to consolidate appeals

	and retain briefing and argument schedule is granted.
3/12/02	Filed Appellees Gerling's opening brief and excerpts of record.
3/12/02	Filed Appellees Gerling's second brief on cross-appeal.
3/13/02	Filed Appellees Winterthur International's second brief on cross-appeal and supplemental excerpts of record.
3/18/02	Filed Federal Republic of Germany's motion for leave to file amicus curiae brief.
3/27/02	Filed Appellees American Insurance Ass'n, American Re-Insurance Co., and Generali's second brief on cross-appeal.
3/28/02	Order (Alfred T. GOODWIN, Susan P. GRABER, and Richard A. PAEZ, Circuit Judges): The motion of the Federal Republic of Germany for leave to file brief amicus curiae is granted. The brief received 3/18/02 is ordered filed.
4/10/02	Received Appellant Harry Low's third cross-appeal brief.
4/10/02	Filed Appellant Harry Low's answering brief and supplemental excerpts of record.
4/16/02	Filed joint motion of the Appellant, Appellees and amicus curiae United States for modified oral argument time periods.
4/22/02	Order (Alfred T. GOODWIN, Susan P. GRABER, and Richard A. PAEZ, Circuit Judges): * * * Mike Kreidler's motion to file brief amicus curiae is granted. The brief tendered 2/4/02 is ordered filed. Bet Tzedek

	Legal Services' motion for leave to file amicus curiae brief is granted. The brief tendered 2/5/02 is ordered filed. The joint motion of the Appellant, Appellees, and amicus curiae the United States for modified oral argument time periods is granted as follows: Appellant 30 minutes, Appellees 30 minutes, and the United State 10 minutes.
4/22/02	Filed Appellant Harry Low's third brief on cross-appeal.
4/29/02	Filed Appellees American Insurance Ass'n and American Re-Insurance's reply brief on cross-appeal.
5/8/02	ARGUED AND SUBMITTED TO Alfred T. GOODWIN, Susan P. GRABER, and Richard A. PAEZ, Circuit Judges.
7/15/02	FILED OPINION: REVERSED AND REMANDED.
7/19/02	Filed motion and clerk order granting Appellees AIA/AmRe, Winterthur, and Generali's motion to extend time in which to file a petition for rehearing to 8/5/02.
7/19/02	Filed Appellant Harry Low's petition for rehearing.
8/5/02	Filed Appellees Gerling's petition for rehearing and petition for rehearing en banc.
8/5/02	Filed Appellees American Insurance Ass'n, American Re-Insurance Co., Winterthur International, and Generali's petition for rehearing and petition for rehearing en banc.

8/6/02	Filed the United States' motion for leave to file brief as amicus curiae in support of petitions for rehearing en banc.
8/12/02	Filed The Federal Republic of Germany's motion for leave to file brief amicus curiae in support of Appellees' petitions for rehearing.
8/14/02	Order (Alfred T. GOODWIN, Susan P. GRABER, and Richard A. PAEZ, Circuit Judges): The motion of the United States for leave to file brief as amicus curiae in support of the petitions for rehearing en banc is granted. The brief tendered 8//5/02 is ordered filed.
8/20/02	Order (Alfred T. GOODWIN, Susan P. GRABER, and Richard A. PAEZ, Circuit Judges): The motion of the Federal Republic of Germany for leave to file brief as amicus curiae in support of Appellees' petitions for rehearing is granted. The brief tendered on 8/12/02 is ordered filed.
9/9/02	Filed order and amended opinion (Judges Alfred T. GOODWIN, Susan P. GRABER, and Richard A. PAEZ, Circuit Judges): The Appellees' petitions for panel rehearing and petitions for rehearing en banc are DENIED. With the above amendment, Appellant's petition for panel rehearing is DENIED. No subsequent petitions for rehearing or rehearing en banc may be filed. REVERSED AND REMANDED.
9/13/02	Filed Appellees American Insurance Ass'n, American Re-Insurance Co., Winterthur International and Generali's motion to stay the mandate.

9/17/02	Filed Appellant Harry Low's opposition to motions to stay mandate.
9/20/02	Received letter dated 9/19/02 from the Appellant regarding the reply in support of the stay motion.
9/25/02	Order (Susan P. GRABER, Circuit Judge): * * * The motions to stay the mandate pending review on certiorari are granted. FRAP 41(d). The mandate is ordered stayed for 90 days pending the filing of a petition for a writ of certiorari in the United States Supreme Court.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. 02-722

AMERICAN INSURANCE ASSOCIATION, AMERICAN RE-INSURANCE COMPANY, *ET AL.*,

Petitioners,

v.

HARRY LOW, IN HIS CAPACITY AS COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,

Respondent.

January 10, 2003

The petition for a writ of certiorari is granted.

APPENDIX D

DECLARATION OF RABBI ABRAHAM COOPER

I, Rabbi Abraham Cooper declare:

1. I am the Associate Dean at the Simon Wiesenthal Center in Los Angeles, California. The facts set forth in this Declaration are personally known to me, and if called as a witness, I could and would competently testify thereto under oath.

2. The Simon Wiesenthal Center was founded in 1997. Today, together with its Museum of Tolerance, it is a 400,000 member international center for Holocaust remembrance and the defense of human rights and the Jewish people. The Library and Archives of the Simon Wiesenthal Center provide a comprehensive resource center on the Holocaust, antisemitism, racism and related issues. Its resources are available to researchers, media, students and the public.

3. Among many other projects, the Wiesenthal Center has been active in assisting Holocaust survivors and their heirs in obtaining information about bank accounts, insurance policies and other assets lost to their families during the Holocaust. The Wiesenthal Center has worked closely with numerous survivor organizations, the California Department of Insurance and others in assisting Holocaust survivors in those efforts.

4. Working with a consortium of genealogy groups and human rights activists, the Wiesenthal Center established a new website in September 1999 which includes a database listing over 50,000 names of Jewish victims of the Nazis who were forced to identify all of their economic holdings as a prelude to turning over bank accounts, insurance policies and other assets to the Gestapo. As discussed below, it is essential that Holocaust survivors be provided lists of family members who purchased insurance before 1945 in order to enable those survivors to determine whether and against whom they might have a claim for the recovery of insurance proceeds.

5. I am aware of a California law, which I understand to be embodied in California Insurance Code Sections 13800 through 13807, together with implementing regulations. As I understand it, these statutes and regulations require insurers currently doing business in California that sold various insurance policies, directly or through a related company, to persons in Europe, which were in effect between 1920 and 1945, to file certain information about those policies with the California Insurance Commissioner. The Simon Wiesenthal Center strongly supports the enforcement of that law.

6. Most Holocaust survivors were children or young adults when they and their families were uprooted from their homes and stripped of their possessions. Family members were separated from one another and millions were murdered. Many of those who escaped death during World War II were themselves concentration camp inmates who became refugees following their release in 1945. Many of those refugees eventually emigrated from Europe and settled in various places around the globe, including the United States.

7. Because insurance policies would have been obtained by parents, grandparents and other relatives and because of their age at the time, most Holocaust survivors would not know whether, during the period of 1920 through 1945, anyone obtained insurance on which a claim might be made by them. Nor would most survivors know the names of the insurance companies who had issued such policies. Even fewer survivors would have possession of insurance policies or other written evidence of insurance. Heirs of Holocaust survivors, of course, would be expected to have even less information about insurance policies than the survivors themselves.

8. I am aware of a number of Holocaust survivors and heirs, including California residents, who have submitted claims on Holocaust-era life insurance policies to insurance companies. There is a risk that insurance companies will reject claims because the name of the insured person listed by the

claimant (e.g. the claimant's father or grandfather) does not precisely match the name of the insured person in the insurance company's records, even though the names are similar.

9. These "near matches" may often be the result of several factors. First, the family name may have been anglicized since the survivor emigrated to the United States, and the claimant may not know the exact spelling of the name of the insured person. Second, there are many surnames that had multiple spellings in Europe in the early 20th century. Unless the claimant knows the precise name of the insured, there is a risk that he or she will misspell that name and that the claim will be denied. Production of policyholder lists by insurance companies, containing the names and addresses of policyholders, will provide a greater opportunity for survivors to search for and locate relatives who had purchased insurance and will increase their ability to successfully make claims.

10. Nor is it possible for an insurance company to prepare a narrow list of policyholders that is limited to Holocaust victims. First, the insurance companies contend that they are precluded by law from attempting to search their files for only Holocaust victims. They claim that they are not permitted to search for "Jewish" names or rely on other possible religious or racial characteristics of policyholders that might appear in their files.

11. Second, even if insurance companies were otherwise permitted to search their files for policyholders who were Holocaust victims, any list that they would compile would necessarily be incomplete. The companies have acknowledged that they could not necessarily determine from their records who was a Holocaust victim, and even organizations dedicated to Holocaust research such as Yad Vashem only have a partial list of such victims. Thus, even if an insurance company attempted to match the names of its policyholders with databases such as those maintained by Yad Vashem, the

matches would necessarily be incomplete and would not identify all policyholders who were Holocaust victims.

12. There are also disputes between the insurance companies and claimants as to what is considered an "unpaid" policy (e.g., some companies consider a policy confiscated by the Nazis to be a "paid" policy). If insurance companies were only required to provide information with respect to what they considered to be "unpaid" policies, then many of them would undoubtedly exclude policies that claimants would likely consider to be "unpaid."

13. Through the Wiesenthal Center's work, I am familiar with the fact that a number of European insurance companies, including Allianz and Munich Re, worked closely with, and indeed lobbied, the Third Reich to strip Jews of their insurance protection. Although there are many examples of that conduct, a well-documented example is the insurance companies' collaboration with the Nazis to deprive Jews of insurance payments for damages they suffered during Kristallnacht.

14. Kristallnacht, or the "Night of the Broken Glass" is the name given to the organized campaign of terror carried out by Nazi street gangs on November 8 through November 10, 1938. Hundreds of Jewish businesses, residences and synagogues were destroyed. Recognizing that German insurance companies could be liable to the Jews for the damage that had occurred, Nazi leaders, including Herman Goering, Joseph Goebbels, and Reinhard Heydrich, met shortly thereafter with Eduard Hilgard, an Allianz executive and head of the Reichsgruppe Versicherungen, an insurance industry trade group.

15. From this meeting, the Nazi government and the insurance companies developed a scheme to deny payment to Jewish policyholders. The scheme involved "payment" of the claims on the books of the companies, followed by immediate confiscation of the policy proceeds by the Reich in payment of an "atonement tax" levied by the Reich against the Jews for "causing" the Kristallnacht demonstrations. There is

documentary evidence that the insurance companies paid only one-half of the Jewish insurance proceeds to the Reich and kept the other half for themselves.

16. Testimony and documentation given by Risk International Services, Inc. to various State Departments of Insurance confirm these facts. A copy of such testimony and documentation presented to the Texas Department of Insurance on August 6, 1998 is attached hereto as Exhibit 1. An English translation of an August 3, 1939 letter reflecting the agreement that the German insurance industry reached with the Reich is attached hereto as Exhibit 2. That translation was made by Risk International.

17. For all these reasons, it is necessary that insurance companies provide information regarding all policies issued by them that were in effect in Europe between 1920 and 1945.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this Declaration was executed in Scottsdale, Arizona on April 24, 2000.

/s/
Rabbi Abraham Cooper

[Exhibits omitted]

APPENDIX E

DECLARATION OF ARTHUR P. STERN

I, Arthur P. Stern declare:

1. I am Chairman of the Holocaust Insurance Restitution Committee of the Jewish Federation of Greater Los Angeles. I am also a Holocaust survivor. The facts set forth in this Declaration are personally known to me. If called as a witness, I could and would competently testify thereto under oath.

2. I was born in 1925 in Budapest, Hungary. I lived there at the time of the commencement of the Holocaust in Hungary, which began on March 19, 1944. I was sent to the concentration camp in Bergen-Belsen and ultimately gained entry to Switzerland.

3. In 1998 the Jewish Federation of Greater Los Angeles conducted a demographic survey of the Los Angeles Jewish community. That survey reveals that, as of July 1997, there are approximately 13,972 Holocaust survivors who live in Los Angeles County. The number of survivors actually may be much greater, however, since the definition[] of a "Holocaust survivor" has been expanded by California law since the study was completed to include "any person who was persecuted" and not just those who were in concentration camps.

4. The latest demographic survey also reveals that the Los Angeles Holocaust survivor population constitutes 23 percent of the total Jewish households in poverty, and children of Holocaust survivors comprise 20 percent. Both rates are roughly double the expected poverty rate found in the total Jewish community.

5. Attached hereto as Exhibit 1 is a true and correct copy of the findings from the Los Angeles Jewish Population Survey concerning Holocaust survivors.

6. Attached hereto as Exhibit 2 is a true and correct copy of the Los Angeles Population Survey Research Note on Jewish Holocaust Survivors and their children.

7. The average age of a Holocaust survivor in Los Angeles County is now over 70 years of age.

8. Based on my knowledge of the Jewish communities of California, I believe that there are over 22,000 Holocaust survivors living throughout the State. The children of Holocaust survivors in California number many thousands more.

9. A number of the Holocaust survivors living in the United States have voluntarily registered with the American Gathering/Federation of Jewish Holocaust Survivors. Understandably, many survivors are reluctant to register and have not done so. Attached hereto as Exhibit 3 is a true and correct copy of a chart listing by State the numbers of Holocaust survivors who have voluntarily registered with that organization. As reflected on this chart, California has the second largest Holocaust survivor population in the United States.

10. I am aware of a California law, which I understand to be embodied in California Insurance Code Sections 13800 through 13807, together with implementing regulations. As I understand it, these statutes and regulations require insurers currently doing business in California that sold various insurance policies, directly or through a related company, to persons in Europe, which were in effect between 1920 and 1945, to file certain information about those policies with the California Insurance Commissioner. The Jewish Federation of Greater Los Angeles strongly supports the enforcement of that law.

11. In Central and Eastern Europe during the 1920s and 1930s, the dominant way of investing and saving was through the purchase of insurance policies. Even many poor people purchased insurance policies.

12. Based on my experience dealing with Holocaust survivors, it appears that most insurance policies that were owned by Holocaust victims were lost in the course of the Holocaust or in the movements and migrations of people that took place after World War II. Most survivors who are still alive today were children or young adults during the Holocaust and were not aware that their parents had insurance or the name of the insurance company. Because of the long passage of time, other Holocaust survivors who were adults during the war have forgotten insurance information that they may have once known. Based on my experience dealing with Holocaust survivors, less than 5 percent of survivors and their families still have their insurance policies purchased in Europe prior to 1945.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this Declaration was executed in Los Angeles, California on April 25, 2000.

/s/
Arthur P. Stern

[Exhibits omitted]

APPENDIX F

DECLARATION OF LESLIE TICK

I Leslie Tick declare:

1. I am a senior staff counsel employed by the California Department of Insurance. I have been an attorney at the Department since January 1994. Since late 1997, my primary responsibility at the Department has been to work on Holocaust-era insurance issues. The facts set forth in this Declaration are personally known to me, and if called as a witness, I could and would competently testify thereto under oath.

2. The Commissioner is one of the founding members of the International Commission On Holocaust Era Insurance Claims ("ICHEIC"). I have been one of the Commissioner's representatives to the ICHEIC since that organization was founded in or about August 1998, and have actively participated in the ICHEIC since its founding. The ICHEIC is a voluntary organization consisting of five insurance companies, certain United States insurance regulatory authorities, certain Jewish and survivor organizations, and the State of Israel. Representatives from various other countries, including the United States and the Federal Republic of Germany, have observer status. The purpose of the ICHEIC is to voluntarily pursue the goal of resolving insurance claims of Holocaust victims.

3. The five insurance company members of the ICHEIC represent approximately 35.5% of the pre-World War II European insurance market.

4. The ICHEIC originally had a sixth company member, Basler Lebens, who shortly thereafter left the organization. Other companies, such as Gerling and Victoria, have been invited to join the ICHEIC but have declined to do so. There are a number of companies who wrote significant amounts of Holocaust-era insurance who are not members of the ICHEIC.

5. Participation by an insurance company in the ICHEIC does not assure that company "legal peace." For example, the ICHEIC claims procedures specifically permit a claimant whose claim is disallowed or who is dissatisfied with the offer made to pursue his or her claim in court.

6. In 1997, the Department of Insurance developed a "Holocaust Survivor/Insurance Claims-Questionnaire." The Questionnaire has been sent to persons, almost all of whom are California residents, who have requested them. The Questionnaires are then completed by the recipients and returned to the Department of Insurance. The purpose of the Questionnaire was to serve as a claim form once monies from European insurers are made available to settle claims of unpaid insurance benefits. A true and correct copy of a completed Questionnaire received by the Department is attached to the Nasch Declaration as Exhibit 1.

7. The Department has received approximately 2,300 completed Questionnaires to date. Almost all of them are from California residents. These questionnaires are being logged, copied and prepared for submission to the ICHEIC. To date, approximately 1,400 claim files have been forwarded to the ICHEIC by the Department. The ICHEIC requires each claimant to complete an additional form before the claim can be submitted, and the completion and execution of those forms has slowed the submission of the claims to the ICHEIC.

8. The Department has also received approximately an additional 2,000 Short Forms (requests for full Questionnaires which contain pertinent claims data) from people who have not yet formally submitted a claim. These Short Forms are filled out by potential claimants and by intake personnel who receive calls from potential claimants on a special "800" telephone number that was established.

9. Of the approximately 2,300 Questionnaires, only about 116 have some documentary evidence of insurance. The remaining 2,184 Questionnaires have varying degrees of

anecdotal evidence regarding the existence or possible existence of insurance. Most of these 2,184 claimants are not able to identify the name of an insurance company. On the few Questionnaires that do provide the name of an insurance company, the claimant often expresses some uncertainty about the identity of the company.

10. Of the approximately 116 claimants who have documentary proof of insurance, approximately 50 of those have proof of insurance issued by an ICHEIC member company or one of its subsidiaries. The other 66 have documentary proof of insurance purchased from companies that are not members of the ICHEIC.

11. Similarly, of the claimants with no documentary proof of insurance who identify the name of an insurance company, many of the claimants name insurers which are not members of the ICHEIC.

12. The ICHEIC has developed claims handling standards pursuant to which claims are to be initially evaluated by member companies who then decide whether to accept claims and, if accepted, how much money is to be offered to the claimant. According to the ICHEIC, the companies are supposed to evaluate claims based on so-called "relaxed standards of proof" and valuation guidelines developed by the ICHEIC.

13. These "relaxed standards of proof" generally require documentation to support the existence of a policy. Thus, the ICHEIC has determined that the existence of an insurance policy (but not necessarily the validity of a claim) will be considered adequately substantiated by any one of the following:

A. An original or copy of an insurance policy;

B. Original or copies of premium receipts for an insurance policy;

C. Information in the records of the insurer that verifies the existence of an insurance policy;

D. Written correspondence between the insurer or agent or representative of the insurer and the claimant that verifies the existence of an insurance policy;

E. Records held or maintained by any governmental body that verify the existence of an insurance policy; or

F. Records of any governmental body held by the claimant that verify the existence of an insurance policy.

14. There is also a "catch-all" provision by which member companies are supposed to consider "whether any other document or statement or combination of documents or statements are sufficient to substantiate the existence of an insurance contract."

15. In about May 1999, it became clear that because of a number of delays caused by administrative problems and by the inability of the ICHEIC member insurers to agree to certain claims procedures and valuation standards, the ICHEIC was not going to be able to "launch" its claims process and announce that process to the world for some time. The ICHEIC then developed an interim "fast track" claims process. Pursuant to this process, States and Jewish groups which had been collecting claims were invited to submit their "best" claims (those with some documentary evidence). They were not, however, precluded from also submitting claims based on anecdotal evidence where the claimant had no documentary evidence. Pursuant to the "fast track" process, the member companies were to evaluate these claims and make offers on them pursuant to the ICHEIC valuation and claims standards that were already in place. Offers could later be increased if increases were warranted based on subsequent valuation standards approved by ICHEIC.

16. In April 2000, the ICHEIC reported on the status of the "fast track" claims. Out of 909 "fast track" claims submitted,

the member companies had made offers on 124 claims and had declined 393 claims. Another 389 claims (43% of the claims submitted) were still pending and had been pending for over 90 days.

17. In March 2000, the ICHEIC reported that during its review of claims submitted to member companies pursuant to the "fast track" process, it had "not yet come across any case submitted under [that] process where an insurance company has accepted a claim on the basis of evidence supplied by the claimant which would fall under the catch-all clause." Instead, as far as the ICHEIC could tell, "in all cases where insurers had made an offer, evidence of a policy has been demonstrated by one or more of the six types of documentary evidence listed on the standards of proof."

18. The ICHEIC described these rejected claims, some of which had been rejected even though the claimant had provided the actual policy number and other policy details:

A. The claimant was able to state the insurer, currency, policy value, when it was taken out, and when premium payments stopped. The claimant submitted a handwritten note written by his mother listing assets and referencing two insurance policies (without policy numbers). The insurer declined to make an offer, stating that the standards of proof require written evidence of the policy.

B. The claimant submitted an address book which listed policy numbers, amounts, insured, where and when insurance was purchased. The claim was sent to the insurer in September 1999. In February 2000, the insurer declined to make an offer saying that its records showed no evidence of a contractual relationship and that the documents submitted were inadequate.

C. The claimant submitted a letter written by the policy holder shortly before his deportation which listed his assets, including insurance policies and the cities in which they were purchased. The claimant stated that there was a separate list of

policies, including policy numbers, that was lost during the war. The claim was sent to the insurer in September 1999. In February 2000, the insurer declined to make an offer, stating that there was insufficient evidence of insurance.

19. The ICHEIC has directed its five member insurance companies to publish lists of unpaid policyholders. That directive, however, like every other aspect of ICHEIC, is based on voluntary compliance by the insurance companies. The publication of lists by the companies has thus far been inadequate and incomplete. The ICHEIC requires only lists of "unpaid" policies issued to Holocaust victims. The insurer members of the ICHEIC have admitted that their lists do not include policies confiscated by the Nazis, surrendered to the Nazis, or paid into blocked accounts. Nor do those lists include policies written by the member companies' Eastern European subsidiaries.

20. Attached as Exhibit 1 is one of the pages of the ICHEIC list that was made available on the Internet beginning on or about April 2000. That page reflects, among others, a policy issued by Allianz, a German company. I am not aware of any objection by the German government to this publication of Allianz policyholders.

21. None of the policyholders listed on the Nasch, Bard, Rand, Rattner or Weiss California Questionnaires appear on any list published by the ICHEIC.

22. Generali wrote insurance in numerous European countries before World War II. Although it apparently had a subsidiary that wrote some life insurance policies in Germany, Generali sold most if its insurance in Eastern and Central Europe, including Poland, Hungary, Czechoslovakia, Italy and Austria. Generali also write insurance in France, Belgium, the Netherlands and Greece. The vast majority of its unpaid policies (98%) were written outside of Germany.

23. Generali has reported to the ICHEIC and to various State Insurance Commissioners, including Commissioner Quackenbush, that it has a computer disk with information regarding approximately 340,000 persons to who it issued between 1918 and 1945 in Eastern Europe and Austria. Generali has also reported that it has another disk with the names of approximately 90,000 persons in Eastern Europe and Austria whose Generali policies were in force as of December 31, 1937. These disks contain the policyholder's name, date of birth and place that the policy was issued.

24. Generali has also reported to the ICHEIC and to Commissioner Quackenbush's office that it either has prepared or will soon be completing lists of its Western European, Italian and Greek policyholders. Presumably, these lists will include only those policies that Generali considers to have been issued and unpaid to persons it considers to be Holocaust victims.

25. Generali has also admitted to the ICHEIC that it also wrote a substantial amount of insurance in Eastern Europe before World War II through subsidiary companies. Generali has refused, however, to disclose either the names of those subsidiary companies or the names of policyholders to whom insurance was issued by its subsidiaries.

26. Generali apparently delivered the 90,000-name disk to Yad Vashem sometime in 1999. I do not believe that Generali provided Yad Vashem with its 340,000 person disk. Yad Vashem has apparently attempted to match the names on the Generali 90,000-name policyholder list with Yad Vashem's list of Holocaust victims. The ICHEIC was advised by Yad Vashem that Yad Vashem does not have a complete list of Holocaust victims and that most of the persons on its lists are Jewish.

27. Yad Vashem reported on its progress with the Generali list in October and November 1999. Yad Vashem has now apparently identified approximately 8,740 names from Generali's 90,000-name policyholder list as actual or probable

Holocaust victims. Yad Vashem initially reported 10,000-20,000 matches which were reviewed to "narrow the uncertainty."

28. Allianz has reported to the ICHEIC that it has records relating to approximately 1.3 million life insurance policies issued by it prior to 1945 in Europe. That figure does not include policies written by its subsidiaries, including RAS, who Allianz admits wrote a substantial amount of insurance in Eastern Europe prior to 1945.

29. Allianz has agreed to examine only a sampling of its total policies in order to try to establish which are unpaid and which were issued to Holocaust victims. It has continued to refuse to publish a complete list of either its or its subsidiaries' policyholders to whom insurance was issued in Europe prior to 1945. In or about the Fall of 1999, Allianz agreed to prepare a slightly larger sampling (148,000 names) and to forward that list to Yad Vashem. The apparent purpose of that submission is to permit Yad Vashem to perform the kind of "matching" analysis done with the Generali list. That matching, if it occurs, will necessarily be incomplete, since Allianz has provided Yad Vashem with only about one-tenth of the number of policies issued by it, and Yad Vashem does not in any event have a complete list of Holocaust victims.

30. In addition, according to the ICHEIC, since about February 2000, Yad Vashem has stopped performing any "matching" analysis because [of] a contractual dispute involving the company that developed Yad Vashem's data base. Allianz reported that Yad Vashem has not performed any "matching" analysis of the sample policyholder information it provided and therefore it will submit no further names for publication.

31. Based on Zurich's research of its own archives, it has reported that it wrote approximately 7,000 policies during the relevant period. From that list, Zurich has prepared a list of 22

policies issued to people with names that Zurich considers to be Jewish and which Zurich has classified as "unpaid."

32. Winterthur has created a list of approximately 15,000 policies which it wrote in Germany, France and Belgium during the relevant period. It considers that nine of these policies were written to Holocaust victims and remain "unpaid."

33. The ICHEIC hired an archivist to do research into the Austrian Archive. The Austrian Archive contains assets registries of Austrian Jews and is widely considered to be one of the most complete archives in Europe. In late April 2000, the ICHEIC placed on its website a list of the names of people who listed insurance in their assets. The names culled from the Austrian Archive, however, do not include the name of the insurer.

34. In or about February 2000, Generali advised the California Department of Insurance that it did not intend to renew its current business in the State of California and is seeking to sell blocks of its current business.

35. Each of the plaintiffs (or in the case of the AIA lawsuit, each of the Affected Companies identified in paragraph 6 of the Complaint in that lawsuit) is a capital stock insurer. Except for Generali, each of the plaintiffs (or in the case of the AIA lawsuit, each of the Affected Companies identified in paragraph 6 of the Complaint in that lawsuit) have identified themselves with the California Department of Insurance as members of an Insurance Holding Company System.

36. Attached hereto as Exhibit 2 is a true and correct copy of an Amended Application for Certificate of Authority executed and filed by Gerling America Insurance Company with the California Department of Insurance on or about August 21, 1989.

37. Attached hereto as Exhibit 3 is a true and correct copy of an Amended Certificate of Authority issued to Gerling

America Insurance Company by the California Department of Insurance on or about July 18, 1990.

38. Attached hereto as Exhibit 4 is a true and correct copy of an Appointment of Agent for Service of Process and Stipulation As Required By Law executed by Gerling America Insurance Company on or about June 20, 1983.

39. Each applicant for a Certificate of Authority, including those who are part of an Insurance Holding Company System, must submit a sworn Organizational Affidavit as part of its application. A true and correct copy of the Organizational Affidavit form that must be completed is attached hereto as Exhibit 5.

40. Attached hereto as Exhibit 6 is a true and correct copy of the Order Denying Plaintiffs Ex Parte Application for Restraining Order filed February 18, 1998 in the case of *Assicurazioni Generali v. Quackenbush*, United States District Court for the Northern District of California, No. C98-0625 MJJ.

41. Attached hereto as Exhibit 7 is a true and correct copy of a letter dated March 24, 2000 from Rolf Huppi of Zurich Financial Services to Phillip Angelides, Treasurer of the State of California.

42. Attached hereto as Exhibit 8 are true and correct copies of both the codified and uncodified portion of California Code of Civil Procedure Section 354.5. The uncodified portion, which appears on page 2, is titled "Stats. 1998 ch. 43."

43. Attached hereto as Exhibit 9 is a true and correct copy of the Brief of the United States As *Amicus Curiae* filed by the United States in the United States District Court for the Northern District of Florida in the case titled *Gerling Global Reinsurance Corporation of America, et. al v. Bill Nelson*, No. 4:99-CV-444-RH.

44. Attached hereto as Exhibit 10 is a true and correct copy of a Statement By Treasury Deputy Secretary Stuart E. Eizenstat dated March 23, 2000.

45 Attached hereto as Exhibit 11 is a true and correct copy of a letter dated November 10, 1999 to the Commissioner from the Office of the Prime Minister of the State of Israel and a true and correct copy of a Reuters news report dated March 21, 2000.

46. Attached hereto as Exhibit 12 is a true and correct copy of a press release dated April 4, 2000 issued by the Commissioner's office, an article that appeared in the New York Times dated December 2, 1999 and a press release dated December 1, 1999 issued by the Commissioner's office.

47. Attached hereto as Exhibit 13 is a true and correct copy of pages 87-88 of the Transcript of Proceedings on December 2, 1999 in California Department of Insurance Investigative Hearing No. 1H-99-00-9060.

48. Attached hereto as Exhibit 14 is a true and correct copy of pages 153-161 of the January 13, 2000 Transcript of Hearing before Deborah Senn, Insurance Commissioner for the State of Washington.

49. Attached hereto as Exhibit 15 is a true and correct copy of pages 3938-3940 of Best's Insurance Reports, 1999 Edition.

50. Attached hereto as Exhibit 16 is a true and correct copy of a letter from Jeffrey M. Klein, Vice President of Government and Industry Affairs for Royal & SunAlliance to Glenn Pomeroy, Chair, N[A]IC Internal Holocaust Commission Task Force dated March 7, 2000.

51. Attached hereto as Exhibit 17 is a true and correct copy of pages 960-961 of Best's Insurance Reports, 1999 Edition.

52. Attached hereto as Exhibit 18 is a true and correct copy of pages 119, 120, 124 and 125 of Best's Insurance Reports, 1999 Edition.

53. Attached hereto as Exhibit 19 is a true and correct copy of pages 4963, 4964 and 4968 of Best's Insurance Reports, 1999 Edition.

54. Attached hereto as Exhibit 20 is a true and correct copy of the English translation of a letter dated January 15, 1999 from the Federal Commissioner for Data Protection to Zurich Insurance Company as well as a copy of the Swiss Federal Law on the Protection of Data.

55. Attached hereto as Exhibit 21 is a true and correct copy of Page 1 of the Management Discussion and Analysis of Generali U.S. Branch's 1998 Annual Statement filed with the California Department of Insurance.

56. Neither the Royal & SunAlliance Insurance Group nor the CGU Insurance Group are members of the International Commission On Holocaust-Era Insurance Claims.

57. Attached hereto as Exhibit 22 are true and correct copies of pages 1539-1544 and 1975-1986 of Best's Insurance Reports, 1999 edition.

58. Attached hereto as Exhibit 23 is a true and correct copy of Gerling America Insurance Company's "Management's Discussion And Analysis Of Financial Condition And Results Of Operations" dated December 31, 1998 filed with the California Department of Insurance.

59. Attached hereto as Exhibit 24 is a true and correct copy of the face page and page 130 of Gerling America's Insurance Company's 1998 Annual Statement filed with the California Department of Insurance.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this Declaration was executed in San Francisco, California on May 3, 2000.

/s/
Leslie Tick

[Exhibit 5 (other Exhibits omitted)]

CALIFORNIA CERTIFICATE OF
AUTHORITY APPLICATION

ITEM #8
ORGANIZATIONAL AFFIDAVIT

See affidavit instructions before completing affidavit.

1. Name of applicant (and intended Fictitious Business name, if any): _____

   A. Type of application: _____

   B. Reason for application: _____

   C. Statutory home address of applicant: _____

   _____

   D. Primary location of books and records for applicant:

   _____

   E. Applicant's state of domicile: _____

   F. NAIC number of applicant (including group number, if any): _____

   G. Federal employer identification number of applicant:

   _____

2. If applicant is part of a holding system, or has subsidiaries, or affiliates, provide a detailed organizational chart. *Place an asterisk * by all insurers* holding a *Certificate of Authority in California.*

3. Name of applicant's ultimate controlling parent:

   A. Statutory home address of applicant's ultimate controlling parent: _____

   _____

   B. Primary location of books and records for applicant's ultimate controlling parent: _____

   _____

   C. Ultimate controlling parent's state of domicile: _____

   _____

4. List names and titles of each of the applicant's Officers and Directors as shown in the format below.

   Name (Last, First, Middle) *Title*

   _____

   _____

   _____

   _____

   A. Under "Name", show name as follows: Last Name, First Name, Middle Name. If there is no Middle Name, indicate (NMN). If there is an Initial Only, indicate (IO), following the initial.

   B. Under "Title(s)", indicate the title of each officer/ director. *Do Not* abbreviate.

5. List the names of *all entities and/or individuals* who hold ten (10) percent or more of Applicant's capital stock utilizing the format below.

   Name *Percent of Stock*

   _____

   _____

   _____

   A. Under "Name", if the holder is an entity, show the name of the Corporation, and DBA. Under "Name", if the holder is an individual, show the name as follows: Last Name, First Name, Middle Name. If there is no Middle Name, indicate (NMN). If there is an Initial Only, indicate (IO), following the initial.

B. Under "Percent of Stock", show the percent of stock held by each entity or person.

6. Provide the names and titles of all individuals who are officers and/or directors of applicant's ultimate controlling parent, utilizing the following format.

Name	*Title*

A. Under "*Name*", show name as follows: Last Name, First Name, Middle Name. If there is no Middle Name, indicate (NMN). If there is an Initial Only, indicate (IO), following the initial.

B. Under "*Title*", indicate the title of each officer/director. *DO NOT* abbreviate.

7. Please provide the names of *all entities and/or individuals* who hold ten (10) percent or more of the capital stock of Applicant's ultimate controlling parent, utilizing the following format. (If any of these individuals have not previously submitted an Individual Affidavit they are required to do so.)

Name	*Percent of Stock*

A. Under "*Name*", if the holder is a corporation, show the name of the corporation, and DBA. If the holder is an individual, show the name as follows: Last Name, First Name, Middle Name. If there is no Middle Name, indicate (NMN). If there is an Initial Only, indicate (IO).

B. Under "Percent of Stock", show the percent of stock held by each entity or person.

8. Provide a list, and certified copies of all criminal, civil, regulatory and administrative actions(s) taken against applicant and/or applicant's ultimate controlling parent by any governmental body including actions outside the United States, (within the last ten (10) years) utilizing the following format:

Date:	Show exact date of action. *Example*: 2-10-82.
Reason for Action:	Be specific. Provide code sections if applicable. Give a brief summary of the alleged violation.
Government Body Taking Action:	Be specific. *Do not* abbreviate. Include name, and full address of agency, including zip code.
Case Number (Or Other Reference):	Include both the agency and court case/reference number.
Results of Action:	Give a brief summary of the results of the action.

9. Provide the names, fictitious names, and complete addresses of all Managing General Agents utilized by applicant. If the Managing General Agent is a corporation, provide the full names of all officers, directors, producers, and stockholders who hold ten (10) percent or more of the capital stock. If the Managing General Agent is an individual utilizing a fictitious name, provide the full name of the individual and the fictitious name. Indicate in which states the Managing General Agent is acting on behalf of the applicant. Indicate the type(s) of license(s) the Managing General Agent holds in each state.

_____

_____

_____

_____

_____

10. Provide the names of all states in which applicant holds a certificate of authority or license.

_____

11. Provide the names of all countries in which applicant does business. Provide the name, address, and telephone number of the regulatory agency, which regulates applicant, in *every* country where applicant does business.

_____

12. If the applicant is an Underwritten Title Company, please provide a list of all California counties in which applicant currently holds a Certificate of Authority. Include the addresses of applicant[']s offices in each county.

    Please utilize the following format:

County	*Office Addresses*
_____	
_____	
_____	

I, the undersigned affiant, under the laws of the State of California, do declare that, being duly authorized to do the same on behalf of the insurer, I have carefully examined each of the questions asked in this ORGANIZATIONAL AFFIDAVIT and each of my responses thereto, and do solemnly swear or affirm that all of my responses, information, exhibits, and documentary evidence submitted in support thereof are true and correct.

Dated and signed this _____ day of _____200_, at

(City) _____ (State)_____

_____ _____ _____

Name of Officer (Typed) Title Signature of Officer

APPENDIX G

TREASURY NEWS

OFFICE OF PUBLIC AFFAIRS • 1500 PENNSYLVANIA AVENUE, N.W. • WASHINGTON, D.C. • 20220 • (202) 622-2960

FOR IMMEDIATE RELEASE
June 12, 2000

STATEMENT BY TREASURY DEPUTY SECRETARY STUART E. EIZENSTAT

Today, we are on the verge of a historic agreement. Otto Graf Lambsdorff and Dr. Manfred Gentz will recommend approval of the agreement we have reached on the issue of legal peace for German companies. The creation and funding of the German Foundation, the wide consensus of all the victims groups and plaintiffs' attorneys, along with the Statement of Interest, Executive Agreement, Final Act and the existing legal hurdles create a high probability that all pending and future cases will be dismissed and enduring legal peace will be achieved.

The legal closure agreement will remove a major hurdle to the establishment of a German Foundation. The German Government and German industry have agreed to a 10 billion D-mark capped fund for the resolution of slave and forced labor claims and for all other wrongs committed by German industry arising out of the Nazi era. I want to thank President Clinton and Chancellor Schroeder for their leadership. We have also agreed upon the precise allocation of 10 billion D-Marks to the various types of claims and for a Future Fund.

We have one more significant step before we meet again with all the parties to sign a final act. That next step is for the German Parliament to pass the necessary legislation to establish

the Foundation, an action that members felt they could not take without an effective mechanism for legal peace.

The German Foundation, to be set in German law and based on the U.S. commitment in an Executive Agreement to file statements of interest in support of dismissal, will be part of a half century U.S. effort to bring justice for Holocaust and other victims of the Nazi era.

Our goal is for the German Foundation to be the exclusive remedy and forum for the resolution of all claims against German companies arising out of World War II.

This exclusive role for the Foundation serves the foreign policy interests of the United States. The alternative to this mechanism would be years of litigation that lasts beyond the life-spans of the large majority of survivors.

There will be many winners as a result of our agreement:

- the victims, because more than one million people can soon benefit from the Foundation promptly — otherwise, only a few thousand victims could hope to benefit from litigation in U.S. courts that, even if successful, would take years to achieve;
- the German companies, because they have taken a major step to ensure that they will not have to pay twice for the same set of facts; and,
- German-American relations.

APPENDIX H

THE WHITE HOUSE
WASHINGTON, D.C.

June 16, 2000

Dear Mr. Steiner:

We are now on the verge of an historic accomplishment, for which the Chancellor's leadership has been indispensable. We have agreed upon a DM 10 billion capped fund for the resolution of slave and forced labor claims and for all other wrongs committed by German companies arising out of the Nazi-era. We have also agreed upon the precise allocation of the DM 10 billion to the various types of claims and for a Future Fund. We have now resolved the difficult issue of reparations. This letter clarifies the exchange of correspondence between the parties and states the final position of the Administration on legal closure.

Let us reiterate on behalf of the President, that the President and the Administration are committed, as provided for in the proposed executive agreement, to enduring and all-embracing legal peace for German companies, for present and for future cases, for consensual and non-consensual cases. We agreed to commit in the agreement to file U.S. statements of interest in U.S. courts, stating, among other things, the U.S. foreign policy interests in dismissal. This was in the President's December 13 letter to the Chancellor. The Chancellor accepted the President's letter as the basis for legal closure, stating that "I greatly welcome the commitment of the U.S. Administration to state that the dismissal of all ongoing and future lawsuits would be in its foreign-policy interest."

We have since strengthened this commitment to give German companies even greater comfort against future suits. Let us review these and then offer our own assurances on behalf of the President:

- We have strengthened the wording of the Elements of the Statement of Interest as Count Lambsdorff requested of Deputy Secretary Eizenstat.
- We have strengthened the language in the Elements of the Statement of Interest as German companies suggested by going beyond the President's letter so that it now reads that it would be in the foreign policy interests of the United States for the Foundation "to be" the exclusive remedy for claims against German companies, rather than that the Foundation "should be regarded" as the exclusive remedy.
- At our own initiative, to further strengthen our Statement of Interest, we have stated that the President has concluded that dismissal of cases against German companies would be in the foreign policy interests of the United States, rather than simply asserting that it was in the foreign policy interests of the United States.
- Further, at our initiative, we will have the Secretary of State issue a formal statement of U.S. foreign policy emphasizing our strong interests in the German Foundation as the exclusive remedy and forum for claims and strongly favoring dismissal of Nazi-era cases brought against German companies that could threaten it. This will be accompanied by a declaration by Deputy Secretary Eizenstat that these negotiations, which have resulted in this Executive Agreement, continue a 55-year effort by the United States government to work with the German government to address the consequences of the Nazi-era and World War II.

We want to add our assurances, on the President's behalf. We have worked together with you to develop this historic German initiative. We do not wish to take any action that would perpetuate present or future cases. Indeed, it will be the enduring and high interest of the United States to support

efforts to achieve dismissal of all World War II-era cases, and the United States will act accordingly. To do otherwise would threaten the very Foundation Initiative to which all of us, including the President and Chancellor, have devoted so much time and effort. We will state in our Statement of Interest and in the Executive Agreement that for the last 55 years the United States has sought to work with Germany to address the consequences of the Nazi-era and World War II through political and governmental acts between the United States and Germany. Because the President believes that it is in the enduring and high interest of the United States, the Department of Justice will state to a court that the dismissal of all cases is in our foreign policy interests, and will affirmatively recommend dismissal on any valid legal ground, which, under the United States system of jurisprudence is for the U.S. courts to determine. Moreover, the United S[t]ates will take no legal position in U.S. courts on pending and future cases which would itself preclude dismissal of these cases, and will, in fact, enumerate the real, legal hurdles plaintiffs face.

We appreciate your confirmation on behalf of both the German Government and German companies that these assurances resolve this important issue.

Sincerely,

Samuel R. Berger
Assistant to the President for
National Security Affairs

Beth Nolan
Counsel to the President

The Honorable Michael Steiner
National Security Assistant
Office of the Federal Chancellor
Federal Republic of Germany
Berlin

APPENDIX I

BUNDESKANZLERAMT
Michael Steiner
Foreign Policy and Security Advisor
of the Federal Chancellor

Berlin, July 5, 2000

The Honorable
Mr. Samuel [R]. Berger
Assistant to the President for
National Security Affairs
The White House

Washington, D.C.

Dear Sandy:

Thank you very much for the letter of June 16 which you together with Beth Nolan, Counsel to the President, sent to me following our telephone conversations and the talks held in Washington on June 12 between Graf Lambsdorff, Dr. Gentz and Deputy Secretary of the Treasury Eizenstat. The letter accurately reflects the agreement reached between Graf Lambsdorff, the Foundation Translation Initiative of German Enterprises and Mr. Eizenstat. I would like to thank you for your personal commitment towards resolving the difficult issues surrounding legal peace for German industry within the framework of the Foundation Initiative. We were very much aware of the constitutional problems on the American side.

I have been asked to inform you that the agreement now reached on lasting and comprehensive legal closure for German companies regarding suits in the United States relating to the involvement of German companies in the crimes committed during the Nazi era or World War II, has been accepted by both the German Government and the German companies participating in the Foundation Initiative.

The Chancellor regards the personal commitment of the President of the United States as crucial to the establishment of the Federal Foundation. The agreement now reached has

removed the most important obstacle to the completion of the Foundation Act which will most likely be adopted by the German Bundestag on July 6. The German Government remains determined to begin compensation payments to former forced laborers by the end of this year.

After the entry into force of the act on the Foundation Initiative it will largely depend on the plaintiffs' lawyers and American judges whether this objective can be achieved. The German side will do everything in its power to make the necessary preparations, including the conclusion of agreements with partner organizations so that payments can begin as soon as the pending cases have been dismissed.

Sincerely,

/s/ Yours Michael Steiner

APPENDIX J

TREASURY NEWS

OFFICE OF PUBLIC AFFAIRS • 1500 PENNSYLVANIA AVENUE, N.W. • WASHINGTON, D.C. • 20220 • (202) 622-2960

FOR IMMEDIATE RELEASE
Text as Prepared for Delivery
July 17, 2000

DEPUTY SECRETARY OF THE
TREASURY STUART E. EIZENSTAT
REMARKS AT THE 12th AND CONCLUDING
PLENARY ON THE GERMAN FOUNDATION
BERLIN, GERMANY

"Historic" is a much-abused word, used so often it has become debased. But today's agreement is genuinely historic, marking the culmination of what is likely to be the last major multilateral negotiation with Germany for the wrongs perpetrated during Nazi Germany's ruinous period of power from 1933 to 1945.

German companies, along with Germany's Government, have courageously come to terms with injuries largely ignored for 55 years, which for decades they insisted were the responsibility of the German Government, if anyone, to address. In so doing, they are providing some justice, however belated and for only a small fraction of the victims, but justice nevertheless to the elderly survivors never before compensated for these historically grave wrongs — slave and forced laborers of whom some one million of more than 10 million survive; those whose property were confiscated through Aryanization; others who were subject to medical experiments and other wrongs; those whose insurance policies were never paid, and all those who suffered at the hands of German companies.

All of the countries and organizations involved represent people grievously injured by German companies and the Nazi regime. Yet in allocating funds, we largely avoided arguments over degrees of suffering. We recognized that all of those eligible deserved to be recognized and compensated. Jewish-non-Jewish ties were thereby strengthened. In point of fact, most of the funds for slave and forced laborers will go to deserving non-Jews too long forgotten.

Permit me to provide a context for what has taken us 18 months to conclude. I refer to the five Central and Eastern European Governments — Belarus, the Czech Republic, Poland, Russia, and Ukraine, the State of Israel, the German Government, representatives of the Bundestag, lawyers for the victims, representatives of German companies, and the Conference on Jewish Material Claims Against Germany.

THE HOLOCAUST

One must begin with the Holocaust, probably the gravest crime against humanity in recorded history and history's greatest robbery — robbery of personal effects, art, property, insurance, the right to compensation for labor, and, ultimately, dignity. Slave Laborers, Jewish and non-Jewish, who lived in concentration camps while they were forced to work, will receive the highest per capita allocation, because they were being worked to death. The Nazis had three methods of extermination: gassing, shooting and slave labor, known in German as "Vernichtung durch Arbeit," literally "extermination through labor."

The Nazi regime, in addition to attempting to conquer Europe and subject nations to a racist ideology, also undertook a war within a war, one to exterminate the Jewish people. They often sacrificed resources for the broader war effort for this war against an entire people. As one historian described it, "the Nazi Holocaust transcends the bounds of modem historical experience ... . Never before in modem history had one people made the killing of another the fulfillment of an ideology..."

The German legislation passed by the Bundestag last week acknowledged these historical facts and accepted the responsibility for them. The preamble to the law states:

> "that the National Socialist State inflicted severe injustice on slave laborers and forced laborers, through deportation, internment, exploitation which in some cases extended to extermination through labor...,"
>
> "that German enterprises which participated in the National Socialist injustice bear a historic responsibility and must accept it, ..."
>
> "that the German Bundestag acknowledges political and moral responsibility for the victims of National Socialism."

The Conference on Jewish Material Claims Against Germany played a critical role in our success. The Conference was led by Israel Miller, Israel Singer, Gideon Taylor, and Karen Heilig, together with a team of attorneys, Stan Chelsey and Jeanne Geoppinger. The State of Israel, represented by Minister Rabbi Melchoir, Binjamin Shalev, Lenny Ben-David, Bobby Brown, and also with Holocaust survivors Ben Meed, Roman Kent, Noach Flug, Karl Brozik, Saul Kagan, and Ben Helfgott also played a key role. They all constantly reminded us of the moral dimension of our effort and kept all of us pointed toward the ultimate goal of justice for those who suffered, Jew and non-Jew alike. The Claims Conference is a worthy partner organization to handle the claims of Jewish slave and forced laborers.

This agreement does not end moral responsibility for the Holocaust. Nothing can erase the memory of those who died, of the culture and potential achievements lost, of the suffering of those who survived, of the lessons the Holocaust must teach us about the importance of tolerance and the rule of law, of the need for good people not to remain silent in the face of evil, of the need for prompt international response to human rights violations. All of this should remain in our hearts and minds as

long as people occupy this planet. But at the same time, this historic agreement does help to close a chapter for those who have waited so long for some measure of justice, and it does help to heal wounds left open during the lifetime of many of the survivors.

CENTRAL AND EAST EUROPEANS

One of the most important achievements of our negotiations is to provide belated recognition and payments to the double victims of the 20th Century's worst evils — Nazism and Communism, some one million citizens of Central and Eastern Europe who were forced laborers and in some cases slave laborers of Nazi industry and agriculture. They were forced to keep the German economy running while Germans went to war. They received little or no compensation and lived in harsh conditions, guarded camps and, in some cases, concentration-like camps. As if this was not enough, they then lived for over four decades after World War II under the iron rule of Communist governments, denied compensation from Germany, until the programs of the 1990s. At last their suffering is being recognized.

The German Foundation has a responsibility to ensure that they are treated fairly and equitably, and that all people similarly situated are treated the same. We will do all we can to help achieve that result.

I want to applaud the representatives of the governments of Belarus, the Czech Republic, Poland, Russia, and Ukraine, led respectively by Belarus Deputy Foreign Minister Vladimir Gerasimovich, Jiri Sitler of the Czech Republic, Polish Deputy Foreign Minister Jerzy Kranz, Russian Ambassador Valentin Kopteltsev, and Ukraine Deputy Foreign Minister Olexander Maidannyk, as well as the leaders of their Reconciliation Foundations, which will handle claims in their countries. All of you made important contributions and were excellent representatives for your people. You have each written an important page in your country's histories.

GERMANY

We must never forget that half of the 10 billion DM amount to reach a dignified payment level for victims came from the Federal Republic of Germany, through its Government and parliament, and thus from all of the German people. Despite the efforts of postwar German Governments to address the consequences of Nazi horrors, we found ourselves struggling with this moral issue again, 55 years after the end of Hitler's Germany. Many countries and leaders are reluctant to face the past. Here Germany's leaders were willing to recognize an important gap in past compensation and restitution programs. It is to Germany's eternal credit that your leader, Chancellor Schroeder, chose to face the wrongs perpetrated by Germany's companies during the War and the German state's own employment of forced and slave laborers and to reach out to surviving victims. The leadership and courage of Chancellor Schroeder, and his willingness and that of his government and the Bundestag and Bundesrat to contribute 5 billion DM to the German Foundation at a difficult budgetary and economic time, has been inspirational.

This adds a new dimension to Germany's collective and continuing acceptance of responsibility for Nazi wrongs, shouldering an obligation never matched by any other nation in history. Since its founding, the Federal Republic of Germany has made compensation and reconciliation for wrongs committed during the Nazi era an important part of its political agenda. The agreement we sign today is a significant new chapter in that continuing, and ongoing responsibility. You have set an example for the 21st Century other nations would do well to follow.

No one has set a better moral tone for our work than German President Rau, whose statement in December in which he "begged forgiveness" on behalf of German enterprises and the German people for the wrongs committed, remains the signature moral position in this long affair.

Yet from its inception, this has been at its heart a German company initiative. It was this generation of enlightened German industrialists and financial leaders who were willing to meet the moral responsibility for the actions of their corporate predecessors. For sure, there were practical and legal dimensions to their actions, given the pendency of class actions against them in the United States, one of their largest markets. But it would be unfair and misleading to suggest that this was their sole motivation for the actions they have taken. They have contended from the start that they bore no legal responsibility today. Indeed, there are a variety of legal hurdles to any recovery in U.S. courts.

But German companies sued in U.S. courts have clearly assumed a moral responsibility, thereby setting, a standard for good corporate citizenship. This is evidenced by their willingness to create a Foundation which will pay many more victims than those surviving laborers their companies employed or wronged — perhaps as many as a million more, those who worked for defunct German companies, those not subject to the jurisdiction of U.S. courts, SS companies, and public employees, and to permit the Reconciliation Foundation to pay agricultural workers. This moral dimension is further demonstrated by the contributions of literally hundreds of German companies who have absolutely no legal risk in U.S. courts or elsewhere. Moreover, German companies insisted on an adequately financed Future Fund within the capped 10 billion DM-plus interest fund, for the benefit of heirs and for education projects and programs to promote tolerance and human rights. We are certain that German enterprises will rise to the challenge of promptly raising their 5 billion DM contribution.

There are many German company leaders who deserve credit, including Deutsche Bank Chairman Breuer, and members of the German Foundation Initiative Legal Working Group, headed by Dr. Klaus Kohler. But the leader of the German company effort from the start has been Manfred Gentz,

the Chief Financial Officer of DaimlerChrysler. Dr. Gentz, with tremendous business responsibilities, undertook the time-consuming task of leading the corporate effort. He has been a tough but fair negotiator, a diligent defender of German corporate interests, and one who never lost sight of his dual goals of a measure of justice for victims and legal peace for German companies. Both goals are now within sight. We would not be here today without him. The legal team of German companies is ably represented by the firm of Wilmer, Cutler, and Pickering, which includes Lloyd Cutler, Roger Witten, Robert Kimmitt, Lou Cohen, and John Trenor.

U.S. LAWYERS

We must be frank. It was the American lawyers, th[r]ough the lawsuits they brought in U.S. courts, who placed the long-forgotten wrongs by German companies during the Nazi era on the international agenda. It was their research and their work which highlighted these old injustices and forced us to confront them. Without question, we would not be here without them. The settlement we reached of 10 billion DM will help hundreds of thousands of victims, beyond those whom the lawyers represent, live out their declining years in more comfort. For this dedication and commitment to the victims, we should always be grateful to these lawyers.

But they have also worked diligently to find solutions to seemingly intractable problems and to cooperate in finding ways to achieve legal peace for German companies.

The legal fees they will receive are far less than would normally be received for such a large settlement and represent only about one percent of the total Foundation sum. This is eminently reasonable given their contribution. Their receiving from the Foundation what is negotiated with German companies and the German Government is indispensable to the implementation of this agreement, and I have pledged, together with Count Lambsdorff and Dr. Gentz, to ensure that this is achieved.

Special recognition is due Mel Weiss, Professor Burt Neuborn, Deborah Sturman, Michael Hausfeld, Martin Mendelsohn, Robert Swift, Ed Fagan, Michael Witti, Steve Whinston, Mel Urbach, Lawrence Kill, Dennis Faucher, Barry Fisher, Carey D'Avino, Linda Gerstel, Irwin Levin, Edward Millstein, Morris Ratner, and Richard Shevitz.

MESSAGE TO VICTIMS AND SURVIVORS

One of the great disappointments is that this agreement comes so many years after the War and that so many who would have been eligible have died. Through this Foundation Initiative we will honor the memories of those who died during and after the Nazi period. To those who still survive, we know that no amount of money can adequately compensate you for the wrongs perpetrated against you. But we hope the dignified sums you will receive will serve as a recognition of your suffering and will enable you to live with less difficulty than would be the case without these payments.

We also hope the Future Fund, which will endure long into the future, will support projects which will remind generations still unborn of your sacrifice.

UNITED STATES ROLE

Why has the U.S. Government taken such a direct role in the settlement of private lawsuits and in helping to shape the German Foundation, "Remembrance, Responsibility, and the Future"? It is because we were asked by the German Government to work as partners with them in facilitating this historic initiative, and all parties to the litigation agreed to our participation. It is because of President Clinton's determination to expeditiously help in their lifetimes those who were victims of German companies and German government injustices, many of whom are American citizens. It is because of our national interest in addressing any tensions in our relationship with Germany, one of our most important in the world, arising out of prolonged litigation and threats of sanctions.

But it is also because the United States for 55 years has supported Germany's efforts to provide justice to victims of the Holocaust and Nazi era, to Jews and non-Jews alike, wherever they lived. This effort has been a continuation of these governmental efforts. U.S. occupation forces passed the first compensation and restitution law to address the wrongs done to victims of Nazi persecution in the early postwar period. This law was later largely incorporated into German domestic legislation, which was encouraged by the United States, and reached millions of Nazi victims in the West (4.4 million claimants under the German Indemnification Law alone). Payments from the German Foundation will add another 5 billion dollars to the 100 billion (in current dollar terms) in compensation, restitution, and pensions that have been paid and will continue to be paid by Germany for acts arising out of the National Socialist period. This new Foundation will make payments to more than one million survivors of the Nazi era, and represents a fulfillment of the task of the past half-century of bringing a measure of justice to the victims.

Our role has been to work cooperatively with Germany as a catalyst and partner to help achieve some justice for far more people and far more rapidly than could ever be achieved in our courts, and to create a mechanism to help German enterprises achieve legal peace in the United States courts. The unique agreement we sign today recognizes our responsibilities, which we will meet to help achieve that result.

The importance the U.S. Government has attached to these negotiations is demonstrated by the direct involvement of President Clinton at critical times, along with his Chief of Staff John Podesta, his National Security Advisor Sandy Berger and his Counsel Beth Nolan, as well as Secretary of State Madeleine Albright and Secretary of the Treasury Lawrence Summers.

But I must single out the remarkable U.S. team who showed brilliance, imagination, determination, sound advice and

counsel, and, yes, moral support to me and to the entire enterprise. Each member of the team, without complaint, added these negotiations to an already overburdened schedule. They never found an obstacle they could not help all of us to overcome. Ambassador J. D. Bindenagel, Ron Bettauer, Eric Rosand, Basil Scarlis, Jody Manning, Richard Smith, John Becker of the State Department; Solicitor General Seth Waxman, David Ogden, David Anderson, David Buchholz, of the Department of Justice; Holly Toye Moore, my Senior Advisor at the Treasury Department, have all served their country and this great cause with unswerving dedication and deserve our praise. The U.S. Ambassador to Germany, John Kornblum, deserves special recognition as one of the fathers of this initiative and the provider of sage advice and extraordinary effort from start to finish, along with his Embassy team, in particular, Mark Scheland.

OTTO COUNT LAMBSDORFF

I have saved the best for last. Count Lambsdorff, my co-chair and long-time friend, has been the one indispensable person to our success. He has spent a lifetime of faithful service to the Federal Republic of Germany, devoting himself to strengthening the German-U.S. relationship. Count, your remarkable work here has added another chapter to a distinguished career. He has been the person most responsible for finding and brokering compromises, for motivating us at difficult moments to never forget the victims we were trying to help. He has been ever faithful, friendly even at the most difficult and tension-filled times, creative and indefatigable.

Count Lambsdorff is a great German patriot who has done yet another great deed for his country. The work of your team of Michael Geier, Otto Loeffler, Gerd Westdickenberg, Stephan Keller, and many others is appreciated.

REMAINING TASKS

To achieve our basic goal of assisting the victims in their lifetimes, we still have work to do. Count Lambsdorff and I have exchanged letters with the plaintiffs' lawyers and representatives of Central and East European governments, and with the Claims Conference, addressing a number of outstanding issues which required clarification following passage of the German legislation, in areas such a[s] insurance, "other wrongs," and payment of attorneys fees. We are determined to see that the commitments in these letters are honored.

I would also like to stress some additional points:

It is critically important that all German insurance companies cooperate with the process established by the International Commission on Holocaust Era Insurance Claims, or ICHEIC. This includes publishing lists of unpaid insurance policies and subjecting themselves to audit. Unless German insurance companies make these lists available through ICHEIC, potential claimants cannot know their eligibility, and the insurance companies will have failed to assume their moral responsibility.

It is also critical that German companies open their archives for research on the Nazi period and World War II and for the identification of any art works they may have in their possession, which might have been looted during the Nazi era.

This is a German enterprise initiative in which they have pledged to provide 5 billion DM. We all expect this money to be provided as soon as possible in an interest-bearing account so that any delay in settlement and dismissal of cases will not further disadvantage aging victims.

The plaintiffs' attorneys are working together with defense attorneys to consolidate and dismiss pending court cases against German firms for wrongs arising out of the Nazi era.

The new Foundation should convene the board of trustees and initiate public notification so that potential recipients may begin to receive payments by the end of this year.

We all now bear a heavy responsibility to implement this historic agreement. The victims have waited 55 years for this day. We can not let them wait longer.

Thank you all for your roles in this historic endeavor.

APPENDIX K

Wednesday July 18[, 2001;] 4:12 PM ET

ARMITAGE SPEAKS ON HOLOCAUST CLAIMS

By Harry Schweid, AP Diplomatic Writer

WASHINGTON (AP) - Deputy Secretary of State Richard Armitage called on German insurance companies to make a fair settlement of claims by victims of the World War II Holocaust.

Armitage told Jewish leaders Wednesday the Bush administration supports efforts to "try to bring a measure of justice to the survivors."

Some 6 million Jews were killed by Germany and its supporters during the war. More than a half-century later, survivors of the nearly successful effort to exterminate Jewry in Europe are still seeking restitution.

In a speech Tuesday to the same Claims Conference, former Secretary of State Lawrence Eagleburger accused Allianz, the large German insurance company, of failing to compensate a single claim of the 4,800 claims submitted by the international commission on Holocaust-era insurance headed by him.

"How much have they paid by July 3rd? A great big fat zero," Eagleburger said of the claims made on behalf of prewar policy holders.

Allianz rejected Eagleburger's criticisms, saying it had settled two claims from victims recently, outside the process established by the international commission. It cited another 18 claims paid out before the commission's creation and a further 170 claims paid by its Italian subsidiary, RAS.

The company said 92 per cent of the claims did not name any insurance company, as survivors failed to recall where their family had held insurance policies.

Declaring "my neutrality has been sorely tested over the past two years," Eagleburger said he doubted an agreement ever would be reached between the German Foundation and the German insurance companies.

Last July, the German Foundation was established in Berlin. Armitage said it began making payments last month to former slave and forced laborers.

Austria has made payments to some Austrian survivors and French banks have made a significant contribution to a fund soon to be distributed to victims or their heirs, Armitage said.

In all, he said, more than 500,000 Holocaust survivors in 67 countries have received about $60 billion in compensation payments.

"The administration of George W. Bush is committed to promoting a measure of justice for victims of the Holocaust as an expression of this country's commitment to human rights and human dignity," the State Department official said.

APPENDIX L

SUPPLEMENTAL DECLARATION OF FRANK KAPLAN

I Frank Kaplan declare:

1. Through my professional corporation, I am a member of the law firm of Alschuler Grossman Stein & Kahan LLP, attorneys for defendant Harry Low in his capacity as Insurance Commissioner for the State of California. The facts set forth in this Declaration are personally known to me and I have first-hand knowledge of the same. If called as a witness, I could and would competently testify thereto under oath.

2. Attached hereto as Exhibit 1 is a true and correct copy of portions of an insurance policy that Generali contends that it issued to Josef Schwarcz. This document was produced by Generali in *Babos v. Generali*, Los Angeles Superior Court Case No. BC188680.

3. Attached hereto as Exhibit 2 is a true and correct copy of a portion of an insurance policy that Generali contends that it issued to Mor Stern. This document was produced by Generali in *Stern v. Generali*, Los Angeles Superior Court Case No. BC185376.

4. Attached hereto as Exhibit 3 is a true and correct copy of the signature and errata sheet executed by Rabbi Abraham Cooper in connection with his deposition taken in these actions on July 27, 2001.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this Declaration was executed in Los Angeles, California on August 13, 2001

/s/
Frank Kaplan

[Exhibit 3 omitted]

[Exhibit 1]

TRANSLATION FROM GERMAN

Agency: (illegible) Application No. 162706

L. No.

ASSICURAZIONI GENERALI
in TRIESTE

Without administrative costs

(Stamp: TRANSLATION FROM THE HUNGARIAN)

Life insurance *Copy*
Management for Hungary Insurance Policy Table: 3.P.
P.N. No. 55283 Age and Term: 37/20

With regard to the following insurance policy, concluded on the basis of the application dated Abaújszántó, January 25, 1927, and the other written declarations of the policy holder and the insured, on the life of Mr. Josef Schwarcz, businessman in Abaújszántó, born, according to his statement, in Abaújszántó on January 19, 1890.

ASSICURAZIONI GENERALI obligates itself, under the general and special insurance conditions contained in this policy, to pay the amount of

2,000 dollars - Ch. New York

immediately upon the death of the insured, half to his wife, nèe Ella Spira and half to the children of the insured in equal shares, or, not later than February 1, 1947, to the insured himself, if he is still living on that date.

For this insurance, there is to be paid an annual premium of

105.40 dollars,

the surcharge for administrative costs and the statutory stamp tax, payable on February 1 of each year as long as the insured lives, but for not more than 20 years.

After the expiration of the fifth insurance year, the premiums shall be reduced in accordance with the rider on the other side of the page.

Without prejudice to the provisions of § 2 of the general insurance conditions, the insurance shall begin on February 1, 1927, at 12 noon.

The company recognizes Mr. Josef Schwarcz, residing in Abaújszántó, as the policy holder.

[illegible].

Premium until February 1, 1928	105.40
Administrative cost surcharge	
Single fee	3.00
Stamp tax	2.11
Total paid in cash	111.11 doll. New York

Annual premium: B'pest, on February 9, 1927

[illegible] doll. New York

ASSICURAZIONI GENERALI Venue § 9.W.

TRANSLATION FROM HUNGARIAN

55283

162708 3.P.
Miskolc 37/20

prepared at Abaújszántó, on January 25, 1927

According to the statement made by József SCHWARCZ, produce merchant, resident of Abaújszántó, on January 19, 1890:

Two thousand (2,000.00) dollars - New York check - after the death of the insured, the above amount must be paid immediately - but not later than February 1, 1947 - in half to the wife of the insured, née Ella SPIRA, and the other half in equal proportion to his children.

One Hundred and Five Dollars and Forty cents ($105.40) - New York check - in whole.

February

first

fifth

On February 1, 1927

Mr. József Schwarcz from Abaújszántó...

In connection with the present insurance policy, the attachment relating to the exercise of war risks is being applied as well.

February 1, 1929 105.40 dollars New York check

3.00

2.71 =

111.11 dollars New York check

On February 9, 1927

[illegible word(s)]					105.40
28.	"	"	"	"	105.40
29.	"	"	"	"	105.40
30.	"	"	"	"	105.40
31.	"	"	"	"	105.40
32.	"	"	"	"	104.58
33.	"	"	"	"	1[??]
34.	"	"	"	"	100.44
35.	"	"	"	"	98.97
36.	"	"	"	"	9[?].7?
37.	"	"	"	"	87.69
38.	"	"	"	"	8[?].79
39.	"	"	"	"	7[?].0?
40.	"	"	"	"	67.46
41.	"	"	"	"	[?]9.0?
42.	"	"	"	"	42.76
43.	"	"	"	"	39.63
44.	"	"	"	"	28.67
45.	"	"	"	"	16.86
46.	"	"	"	"	4.22
					$1,534.63

The present insurance policy deals with U.S. dollars, and therefore both the obligation of the payment of premiums and other expenses as well as the Company's payments must be expressed in U.S.A. dollar value and carried out by drawing a check on a New York bank.

Instead of Section 9 of the General Insurance Conditions, the following resolution [cut off] In the event of mixed insurance, the cash value equaling 5% of the insurance amount calculated without any premiums pursuant to Section 6 [cut off]

Section 10 of the General Insurance Conditions provides that the interest rate [cut off] from time to time.

Budapest. February 9, 1927

Hungarian [illegible] of the Triest General Insurance Company

§10 The maximum amount of a Policy Loan is the buy-back value. After the loan has been granted, 4 1/2% (four and one-half percent) interest must be paid in advance on the established due dates. The Policy Loan must be noted on the Insurance Document.

If the interest is not paid, the Company itself will continue making those payments by buying back the necessary portion of the Insurance amount (§9).

The Company shall have the right to deduct the debt capital from any of its payment obligations under the Insurance Policy in question.

Changing the Beneficiary, transfer, mortgaging

§11 The Beneficiary shall acquire his/her right to satisfaction only on the occasion of the Insurance event; until then all rights arising under the Insurance Policy that can be enforced against the Company shall be held exclusively by the Contracting Party or his/her heir acknowledged by the Company.

§12 Any changes in the person of the Beneficiary, the transfer of rights or the mortgaging of such rights by the Contracting Party shall only be valid, as far as the Company is concerned, if the announced change has been entered on the Insurance Document by the Company.

False information

§13 If the application or any other written statement by the Contracting Party or the

Insured knowingly contains false or biased information, the Insurance Policy will be canceled and the premiums already paid will be forfeited to the Company.

Unassailability

§14 When the Insurance has been in effect for a minimum of three years, the validity of the Insurance Contract is unassailable by the Company, unless the Contracting Party or the Insured entered into the Contract through fraud.

Travels

§15 The Company's guarantee covers unconditionally dangers involved in travel and changes of domicile within Europe. After the Policy has been in effect for six months, it will also cover dangers of travel and changes of domicile outside Europe.

Suicide

§16 If the Insured dies as a result of suicide or during a suicide attempt, the Company will pay the full amount of the Insurance only if the Insurance Policy has been in effect for a minimum of three years; otherwise, regardless whether the Insured was competent or incompetent at the time of commission of the deed, the Company will pay only the amount of the Unearned Premium Reserve.

Duels

§17 If the Insured dies as a result of injuries sustained in a duel, the Company will pay the full amount of the Insurance only if the Insurance Policy had been in effect for a minimum of six months; otherwise, the Company shall have no liability whatsoever and the premiums already paid will be forfeited to the Company.

Hazards of War

§18 If the Insured, fulfilling his legal draft obligation, is summoned for military duty, the guarantees of the Insurance Policy will be extended to his military service.

For professional soldiers and persons volunteering for military service, as well as those serving in the permanent Army, the National Defense Force and the Navy, the Company only insures for hazards of war if a separate agreement is concluded to that effect. If there is no such separate agreement or if the established surcharge is not paid before the Insured's participation in events of war, the Company's obligations for any Insurance shall remain suspended as long as the Insured remains in military service and will be reinstated only after the Insured provides the Company with proof of his satisfactory health and pays all omitted premiums with late interest. If the Insured dies in the course of his military duties or if his health upon completion of his duties is not found satisfactory, the Insurance Policy will be voided and the Company will pay to the Beneficiary or to the Contracting Party the amount of the Unearned Premium Reserve.

§19 The Insurance event must be reported to the Company without delay.

Maturity of the Insurance

§20 To enforce his/her claim, the Beneficiary must provide the Company with the Insurance Document, an official certification showing the age of the Insured (unless this was provided previously) as well as any and all other proofs that may be necessary. The death of the Insured must be documented with an official Death Certificate, and a physician must certify the last illness or other cause of death of the Insured. The attainment of a certain age must be proved with an official Certificate of Life. If the documents provided are regular and sufficient, the Insurance amount will be paid without delay or, if the Insurance Policy calls for payment by a certain deadline, at the deadline established in the Insurance Document.

[Exhibit 2]

TRANSLATION FROM GERMAN

ASSICURAZIONI GENERAL IN TRIEST

Main Office for the Czech Republic in Prague

Licensed to do business in the Austrian Republic pursuant to a decree of the Ministry of the Interior dated 10/4/1927 No. 62802.108

COPY

64813 Insurance Policy Table: 15 An
Age and Duration: 40/20

No. 115285

Based on the application from Uzhorod on March 18, 1929, and the other written declarations of applicant and the life insurance contract of the insured on the life of

Mr. Mor Stern, Merchant in Uzhorod

according to information born in Stropkow on September 23, 1889

The ASSICURAZIONI GENERALI agrees through its main office in Prague and subject to the general and special terms and conditions in this document to pay the amount of

K 30,000.--

on April 1, 1949, to the insured, if he survives to that date, or, if he should predecease, on the above date to the person surrendering this insurance document.

This policy is payable in semiannual premiums of

K 720.--

plus the statutory stamp fee, payable on April 1 and October 1 of each year as long as the insured is alive, but no longer than for th period of 20 years. Upon the expiration of five years the insurance premiums shall decrease in accordance with the application on the reverse side hereof.

This insurance shall, irrespective of the provisions of Art. 2 of the general insurance terms and conditions, begin on April 1, 1929, 12:00 noon.

The company recognizes Mr. Mor Stern residing in Uzhorod as the insured.

Prague, April 23, 1929 ASSICURAZIONI GENERALI IN TRIEST
Main Office for the Czech Republic

First premium to October 1, 1929	K 720.--
one time premium	" 675.30
One time fee	" 90.--
Stamp fee	" 44.50
Total	K 1,529.90

The amount was paid today.
, the

H. [illegible handwriting] Agent:_____

3) The Company shall be entitled to withdraw from the contract on account of incorrect statement of age only if the actual age on the date the insurance commenced was more than 60 years. If the Company exercises its right to withdraw, the premiums paid will be refunded without interest.

4) In determining the premium, a year of life begun shall be assumed to be completed if, upon the commencement of the insurance, more than 6 months of that year of life have passed.

ART. 18

Payments by the Company. 1) All payments by the Company shall take place at its main cashier's office in Prague against acknowledgment of receipt, which shall be certified at the Company's request. Upon request, the amount payable will be sent to the person entitled to receive it at the latter's expense and risk. Return of the insurance policy is a prerequisite for the maturity of each claim under the insurance contract.

2) Payments by the Company shall become due and payable upon the expiration of one month after the notification of the insured event or the date specified in the insurance policy on which, if the insured survives, the insured amount is to be paid; if, however, the investigations necessary to determine the occurrence of the insured event, the scope of the payment obligation or the entitlement to payment, without fault of the Company, cannot be concluded within the one-

Supreme Court, U.S.
FILED
FEB 24 2003
OFFICE OF THE CLERK

No. 02-722

In the Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, AMERICAN RE-INSURANCE COMPANY, *ET AL.*,

Petitioners,

v.

JOHN GARAMENDI, IN HIS CAPACITY AS COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

California's Holocaust Victim Insurance Relief Act ("HVIRA") requires California insurers to provide extensive information regarding every insurance policy in effect in Nazi-dominated Europe between 1920 and 1945 and issued by any insurer with which a California insurer now has a legal relationship. The district court enjoined enforcement of the Act on three constitutional grounds: interference with the federal government's exclusive power over foreign affairs, the Foreign Commerce Clause, and due process. Over the objections of the United States government and affected foreign governments, the Ninth Circuit reversed and upheld the HVIRA in all respects.

The questions presented are:

1. Whether the HVIRA, which the United States government has called an "actual interference" with U.S. foreign policy, and which affected foreign governments have protested as inconsistent with international agreements, violates the foreign affairs doctrine of *Zschernig* v. *Miller*, 389 U.S. 429 (1968).

2. Whether the HVIRA, which regulates on an extraterritorial basis in an area where the United States must speak with one voice, violates the Foreign Commerce Clause and exceeds the scope of legitimate state regulation under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015.

3. Whether the HVIRA, which regulates insurance transactions that occurred overseas between foreign parties more than half a century ago, exceeds California's legislative jurisdiction under the Due Process Clause.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioners are American Insurance Association, American Re-Insurance Company, Winterthur International America Insurance Company, Winterthur International America Underwriters Insurance Company, General Casualty Company of Wisconsin, Regent Insurance Company, Southern Insurance Company, Unigard Indemnity Company, Unigard Insurance Company, Blue Ridge Insurance Company, and Assicurazioni Generali S.p.A. In addition, Gerling Global Reinsurance Corporation of America, Gerling Global Reinsurance Corporation-U.S. Branch, Gerling Global Life Reinsurance Company, Gerling Global Life Insurance Company, Gerling America Insurance Company, and Constitution Insurance Company were parties to the proceedings below.

Respondent John Garamendi is the Commissioner of Insurance for the State of California.

The Rule 29.6 statement for each petitioner is set forth in the petition for a writ of certiorari at pages ii-iii.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals reversing the district court's permanent injunction (Pet. App. 1a-33a) is reported at 296 F.3d 832. The opinion of the court of appeals reviewing the district court's preliminary injunction (Pet. App. 34a-60a) is reported at 240 F.3d 739. The opinion of the district court granting a permanent injunction (Pet. App. 61a-84a) is reported at 186 F.Supp.2d 1099. The district court's preliminary injunction opinion (Pet. App. 85a-113a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2002, and a petition for rehearing was denied on September 9, 2002. Pet. App. 3a. The petition for a writ of certiorari was filed on November 7, 2002, and was granted on January 10, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant text of the Due Process Clause, the Commerce Clause, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, and California's Holocaust Victim Insurance Relief Act of 1999, Cal. Ins. Code §§ 13800-13807, is set forth in the appendix to the petition for a writ of certiorari (at 114a-122a).

STATEMENT

This case arises from the conflict between United States foreign policy and a California statute "that interferes with the national government's diplomatic efforts" on an issue of intense international interest. Brief for the United States as *Amicus Curiae* Supporting Petitioners, Nos. 02-722 and 02-733, 2 ("U.S. *Amicus* Br.").

The President and Secretary of State have been engaged for years in complex negotiations with foreign nations to achieve

a prompt and comprehensive resolution of Holocaust-era insurance claims. During these negotiations, the United States government has "consistently emphasized the desirability of voluntary, non-adversarial compensation mechanisms." U.S. *Amicus* Br. 2. As a result, the United States reached agreements with foreign governments providing an international commission — the International Commission on Holocaust Era Insurance Claims — with authority to resolve claims with funds contributed by insurers, the German government, and private industry. In return, the United States committed to assist insurers in obtaining "legal peace" in this country, including protection against state legislative and regulatory action.

In the face of this multinational diplomatic initiative led by the United States, the State of California has enacted a legislative scheme to encourage and facilitate litigation over Holocaust-era insurance claims in California courts. As a part of this scheme, the Holocaust Victim Insurance Relief Act of 1999, Cal. Ins. Code §§ 13800-13807 ("HVIRA"), requires insurers licensed to do business in California to provide detailed reports regarding each insurance policy issued by any European corporate relative that was in effect in Nazi-occupied Europe at any time between 1920 and 1945, for use in litigation in California. The HVIRA compels action by insurers from virtually all European countries on policies that were written in Europe, under European laws, and sold to Europeans as long as 80 years ago, and imposes the penalty of license suspension on their California affiliates if they do not comply, even when production of the information would violate foreign law.

In sustaining the constitutionality of the HVIRA, the Ninth Circuit disregarded the constitutional limits on state power over foreign commerce and on state legislative jurisdiction under the Due Process Clause. "In addition, the court of appeals' decision undermines the United States' effective conduct of foreign relations, including its continuing efforts to secure compensation for surviving Holocaust victims within their lifetimes." U.S. *Amicus* Br. 8.

A. U.S. Foreign Policy On Holocaust-Era Claims.

The United States has been "involved in compensating Holocaust victims since the end of World War II." Pet. App. 97a. The U.S. Military Government in West Germany enacted laws seizing property controlled by the Nazi regime and providing "restitution of identifiable property * * * to persons who were wrongfully deprived of such property." SER 533.[1] "The specific issue of confiscated life insurance policies was first addressed in Restitution Orders * * * issued by the Allied Control Counsel in 1949." SER 57.

In 1952, the United States, Germany, the United Kingdom, and France entered into the Convention on the Settlement of Matters Arising out of the War and the Occupation, SER 377-462, under which Germany agreed to create a uniform national restitution law. Germany also concluded bilateral agreements with the United States, Israel, and 15 European nations that "provid[e] payments to the citizens of those countries who were the victims of the Third Reich." SER 1438.

1. The negotiations on the German Foundation.

Since the post-war period in Europe, the United States has remained "actively involved in Holocaust victims compensation efforts." Pet. App. 98a; U.S. *Amicus* Br. 2. Within the past decade, the United States has undertaken "the last great compensation related negotiation arising out of World War II," SER 940, to "bring some measure of justice" to Holocaust survivors and their heirs and beneficiaries. Pet. App. 127a.

In 1999, President Clinton and Chancellor Schroeder participated in negotiations establishing the "Foundation, 'Remembrance, Responsibility and the Future'" to be funded by the German government and German corporations to resolve the claims of those "who suffered at the hands of German banks, insurance companies, and other German companies."

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[1] Citations to "ER" and "SER" refer to the Excerpts of Record and Supplemental Excerpts of Record in the court of appeals.

SER 937-938. In return for the creation of a 10 billion Deutschemark ($5 billion) Foundation to pay Holocaust-era claims, the President offered to take "unprecedented steps" in the United States — including the filing of statements of interest in litigation in U.S. courts against German companies over Holocaust claims — to ensure that "the Foundation should be regarded as the exclusive remedy for all claims against German companies arising out of the Nazi era." *Ibid.*

Deputy Secretary of the Treasury Stuart Eizenstat, the principal U.S. representative in negotiations on the German Foundation (SER 941), observed that the "crucial element" in convincing German companies to participate in the Foundation was the assurance "that they not pay twice, once into this foundation and a second time into U.S. courts." SER 941.

In negotiations on the Foundation in Berlin on December 17, 1999, Secretary of State Madeleine Albright stated that

> [t]he United States is agreeing to assist in providing legal peace to German companies, both in our courts and from state and local action. * * * Chancellor Schroeder and the German companies took the lead in proposing the Foundation as an alternative to endless litigation that would have drained everyone and satisfied no one.

SER 953. Deputy Secretary Eizenstat added that, "[i]n the context of a comprehensive German Foundation, in all cases * * * brought against German companies for claims arising out of the Nazi-era," the United State government is "prepared to say that the German Foundation should be regarded as the exclusive remedy and that dismissal of such cases would be in our foreign policy interests." SER 957.

After another round of "long and arduous negotiation" in Berlin, Deputy Secretary Eizenstat testified to the Senate Foreign Relations Committee that "an agreement on [the] allocation" of German Foundation funds had been reached. Pet. App. 129a. Of the 10 billion Deutschemarks contributed to the

Foundation, it was agreed that "[o]ne billion will go to property claims and insurance claims, as well as property and insurance humanitarian funds." *Ibid.*

On June 12, 2000, Deputy Secretary Eizenstat announced that the German Foundation negotiations were "on the verge" of a "legal closure agreement" that "w[ould] remove" one of the last "major hurdle[s] to the establishment of" the Foundation. J.A. 50. He explained that "the next step" before the United States "meet[s] again with all the parties to sign" an Executive Agreement on the Foundation "is for the German Parliament to pass the necessary legislation to establish the Foundation, an action that members felt they could not take without an effective mechanism for legal peace." *Id.* at 50-51.

To encourage the German Parliament to pass enabling legislation, the Clinton Administration wrote to Chancellor Schroeder's National Security Assistant to "state[] the final position of the Administration on [the issue of] legal closure" for German companies. J.A. 52. The letter reiterated President Clinton's previous assurance to the Chancellor that the United States is "committed * * * to enduring and all-embracing legal peace for German companies." *Ibid.*

The letter offered additional assurances "to give German companies even greater comfort against future suits." J.A. 52. One of the assurances was an agreement to "have the Secretary of State issue a formal statement of U.S. foreign policy emphasizing our strong interests in the German Foundation as the exclusive remedy and forum for claims and strongly favoring dismissal of Nazi-era cases brought against German companies," along with a declaration by Deputy Secretary Eizenstat that the negotiations "continue a 55-year effort by the United States government to work with the German government to address the consequences of the Nazi-era." *Id.* at 53.

On July 5, 2000, the Chancellor's National Security Assistant responded that the Clinton Administration's letter "accurately reflects the agreement reached" on "lasting and

comprehensive legal closure for German companies." J.A. 55. He further stated that Chancellor Schroeder "regards the personal commitment of the President of the United States as crucial to the establishment of the Federal Foundation." *Ibid.*

2. The Executive Agreement.

Shortly after this exchange of correspondence, the German Parliament enacted the legislation necessary to establish the German Foundation, thereby allowing the United States and Germany to sign the Executive Agreement on the Foundation. Pet. App. 153a-168a.

The Agreement formalizes the obligation of the United States to seek legal closure for German companies. In Article 1, the parties agree that "the Foundation * * * covers, and that it would be in their interests for the Foundation to be the exclusive remedy and forum for the resolution of, all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II." Pet. App. 155a. Article 2 requires the United States government: (1) to "inform its courts through a Statement of Interest * * * that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving [Holocaust-era] claims asserted against German companies"; and (2) to "use its best efforts" "with state and local governments" to achieve "all-embracing and enduring legal peace" for German companies. Pet. App. 156a. Finally, the Agreement mandates that insurance claims that come within the scope of the claims handling procedures of the International Commission on Holocaust Era Insurance Claims ("ICHEIC") "shall be processed * * * on the basis of such procedures and on the basis of additional claims handling procedures that may be agreed among the Foundation, ICHEIC, and the German Insurance Association." *Ibid.*

On the day the Executive Agreement was signed, Deputy Secretary Eizenstat explained why "the U.S. Government [has] taken such a direct role * * * in helping to shape the German

Foundation," noting specifically "our national interest in addressing any tensions in our relationship with Germany, one of our most important in the world, arising out of prolonged litigation and threats of sanctions." J.A. 64.

3. The International Commission on Holocaust Era Insurance Claims.

The commission referred to in the Executive Agreement — ICHEIC — investigates and resolves Holocaust-era insurance claims. Chaired by former U.S. Secretary of State Lawrence Eagleburger, ICHEIC was established in 1998 by European regulators, major European insurers from Germany, Italy, France, and Switzerland, representatives of Jewish and Holocaust survivor organizations, the State of Israel, and the National Association of Insurance Commissioners in the United States. SER 1209, 1213; Pet. App. 134a.

Deputy Secretary Eizenstat testified before the House Banking Committee that the "U.S. Government has supported [ICHEIC] since it began, and we believe it should be considered the exclusive remedy for resolving insurance claims from the World War II era." ER 865. In Senate testimony, he reiterated that ICHEIC should be "the exclusive remedy" for Holocaust era insurance claims. Pet. App. 135a.

ICHEIC has established a three-step process to "expeditiously address the issue of unpaid insurance policies issued to victims of the Holocaust," including "an investigatory process to determine the current status of those insurance policies issued to Holocaust victims" and "a claims and valuation process to settle and pay individual claims" employing "relaxed standards of proof." SER 1213-1215. Each participating insurer must establish "its own dedicated account" for "immediate payment" of claims "which are determined by [ICHEIC] to be valid." SER 1215.

The Executive Agreement on the German Foundation stipulates that ICHEIC's procedures will govern insurance

claims. Pet. App. 156a. Negotiations involving ICHEIC, the German Foundation, and the German Insurance Association culminated in an agreement in September 2002 on claims handling procedures and other related issues. Pet. App. 177a. The Bush Administration intervened to "facilitate" these negotiations. *US Agrees to Facilitate Talks on Holocaust-Era Claims*, AGENCE FRANCE PRESSE, July 18, 2001.

President Bush and Chancellor Schroeder have reaffirmed their commitment to the Executive Agreement on the German Foundation and its goal of "all-embracing and enduring legal peace." Pet. App. 172a. Ambassador Randolph Bell, President Bush's Special Envoy for Holocaust Issues, told Congress on September 24, 2002, that U.S. policy remains that ICHEIC is "the exclusive remedy for unresolved insurance claims from the Nation.. Socialist era and World War II." *Id.* at 177a.

4. *Other foreign commissions and foundations.*

Other European governments have agreed to work with ICHEIC and to support commissions and foundations in their own countries. The United States has concluded an Executive Agreement with Austria that is virtually identical to its Agreement with Germany. U.S. *Amicus* Br. 2.

In January 2000, the United States and Switzerland issued a Joint Statement on Holocaust-era insurance policies. SER 1263-1274. The United States commended Switzerland's ongoing efforts on Holocaust-related matters and specified ICHEIC as the "appropriate forum for resolving Holocaust-related issues" with Swiss insurance companies. SER 1267. Switzerland and the United States condemned as "potentially disruptive and counterproductive * * * investigative initiatives" like the reporting scheme mandated by the HVIRA. *Ibid.* The two governments agreed that the United States would "call on the U.S. State insurance Commissioners and State legislative bodies to refrain from taking unwarranted investigative initiatives or from threatening or actually using sanctions against Swiss insurers." SER 1272.

Referring to these international initiatives, Deputy Secretary Eizenstat remarked in Senate testimony that they "serve[] important U.S. foreign policy interests" (Pet. App. 127a),

> such as maintaining close relations with Germany, a partner of ours in promoting and defending democracy for the last fifty years and a nation that is vital to both the security and economic development of Europe and, with Switzerland, a major trading partner. It also helps in the removal of impediments to greater cooperation and unity among the nations of that continent.

B. California's Regulation Of Holocaust-Era Insurance Policies.

In the midst of these wide-ranging diplomatic efforts, the State of California has taken a far different and unilateral approach aimed at fostering litigation in California courts.

In 1997, the State Insurance Commissioner began a series of highly publicized "investigatory" hearings on Holocaust-era insurance issues. ER 870. The Commissioner subsequently requested $16 million in funding from the legislature, asserting that "[i]t is vital that the Commissioner be involved in every effort to force the insurers to pay the proceeds on these [Holocaust-era] policies." ER 876. The Commissioner stated his intention to "us[e] his power and influence as regulator to get money" for claimants. ER 877.

The California legislature supported this effort. The legislature passed a statute declaring that failure to "pay any valid claim from Holocaust survivors" is an unfair practice and empowering the Commissioner to suspend the license of any insurer that failed to pay on such policies, regardless of whether under the governing foreign law any payments were legally owed. Cal. Ins. Code § 790.15.

The legislature also considered a bill to create a Holocaust-era insurance registry based on records compelled from European insurance companies. The bill was subsequently

enacted as the HVIRA in 1999. The California Department of Insurance supported the "Holocaust Insurance Registry * * * [as] an important measure to ensure that Holocaust survivors and descendants of Holocaust victims obtain their rightful compensation." ER 969.

The California Senate Committee on Insurance described the HVIRA as "ensur[ing] that Holocaust victims or their heirs can take direct action on their own behalf with regard to insurance policies and claims." The Committee reported that the "Department [of Insurance] believes this bill will be of significant assistance to the Department in its endeavor to ensure full payment of claims to Holocaust survivors and their descendants." ER 994-995. The California Assembly Committee on Appropriations described the bill as "provid[ing] assistance to Holocaust victims and their families in collecting the proceeds of insurance policies." ER 999.

1. The extraterritorial reach of the HVIRA.

The HVIRA requires the State Insurance Commissioner to establish a "Holocaust Era Insurance Registry" to maintain "records and information" on all "life, property, liability, health, annuities, dowry, educational, or casualty" insurance policies "in effect between 1920 and 1945" that were sold by a California "insurer," either "directly or through a related company," to persons in Nazi-occupied Europe. Cal. Ins. Code §§ 13803-13804.

The HVIRA provides that each "insurer currently doing business in the state" that sold Holocaust-era policies directly to individuals, or that is "related" to a company that sold Holocaust-era policies, must file detailed reports with the Insurance Commissioner specifying (1) the number of policies the insurer or its related company had in effect from 1920 to 1945 in Nazi-occupied Europe; (2) the name of the holder and beneficiary of each of those policies, and the "current status" of each policy; and (3) the "city of origin, domicile, or address" for each policyholder. Cal. Ins. Code § 13804(a). The HVIRA

further requires that, for each policy reported, the insurer must state, under the threat of criminal penalty (*id.* § 13804(b)), whether the policy has been paid, whether diligence has been used to identify beneficiaries, and whether unclaimed funds have been distributed to charitable organizations.

Through an expansive definition of "related company," the HVIRA extends these requirements to California insurers that *never* issued any policies in effect in Nazi-occupied Europe but that *now* have a corporate "parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate" that did. Cal. Ins. Code § 13802(b). The Act also requires insurers to report information not only on policies that were held by "Holocaust victim[s]" — defined as any "person who was persecuted during the period 1929 to 1945, inclusive, by Nazi Germany, its allies, or sympathizers," *id.* § 13802(a) — but also on *all policies* held by *all persons in Nazi-occupied Europe* between *1920 and 1945*. *Id.* § 13804(a). Finally, the Act directs the Commissioner to "suspend" the "certificate of authority to conduct insurance business in the state" of any insurer that does not comply with its requirements. *Id.* § 13806.

2. The revival of Holocaust-era claims against European insurers in California.

The HVIRA is a central component of the State's Holocaust compensation program. The goal of that program is to enable Holocaust victims and their heirs or beneficiaries to file private lawsuits in California under California law to compel payment of Holocaust-era insurance claims that arose from transactions occurring wholly outside California's borders.

Passed in the same bill as the HVIRA was an amendment of the California Code of Civil Procedure that purports to revive Holocaust-era insurance claims and to provide a California forum in which to litigate such claims. Cal. Code Civ. Proc. § 354.5(b). Any action by a Holocaust victim (or heir or beneficiary) seeking proceeds of insurance policies issued before 1945 "shall not be dismissed for failure to comply with

the applicable statute of limitation, provided the action is commenced on or before December 31, 2010." *Id.* § 354.5(c). This 65-plus-year limitations period is imposed whether or not the plaintiff is a California resident. *Ibid.*

The legislation circumvents otherwise applicable jurisdictional limits by allowing a cause of action to proceed against an entity other than the issuer of a Holocaust-era policy. Any insurance company doing business in California may be held liable for a Holocaust-era policy issued by any of its "related compan[ies]" — whether or not the California company exercises any control over the "related" company. Cal. Code Civ. Proc. § 354.5(a)(3). It is not even necessary for the companies to have been related at the time the policy was issued; so long as they are related at the time of suit, both may be held liable. *Ibid.* Under this scheme, a California insurer that was established in 1999 would be forced to pay a civil claim arising from a 1929 insurance policy, so long as the European entity that issued the policy was, at the time of suit, a "parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate" of the California insurer. *Id.* § 354.5(a)(2).

3. The Insurance Department's international investigation of Holocaust-era insurance claims.

The HVIRA operates in an even broader statutory context that purports to extend the State Insurance Commissioner's mandate far beyond the Nation's borders. The Insurance Department is required under Cal. Ins. Code § 12967(a)(1) to "develop and implement a coordinated approach to gather, review, and analyze the archives of insurers and other archives and records, using onsite teams and an oversight committee to provide for research and investigation into insurance policies, unpaid insurance claims, and related matters of victims of the Holocaust." The Department has "an affirmative duty to play an independent role in representing the interests of Holocaust survivors." *Id.* § 12967(a)(2).

To assist it in this broad-ranging international assignment, the Department is authorized to "employ insurance archaeologists, economists, attorneys, accountants, and other specialists, in this country and in Europe." Cal. Ins. Code § 12967(a)(3). The information compiled by the Department is to be placed in the "centralized data base for the retention of policy and claimant data." *Id.* § 12967(a)(1).

C. Complaints By The United States Government And ICHEIC About The HVIRA.

Shortly after the HVIRA was enacted, Deputy Secretary Eizenstat wrote to Governor Davis and the State Insurance Commissioner complaining of the disruption to U.S. foreign policy caused by the HVIRA. He warned the Governor that the HVIRA "ha[s] already potentially damaged and could derail [German Foundation] negotiations and the progress already achieved by [ICHEIC]," because, "for th[e German Foundation] deal to work[,] * * * German industry and the German government need to be assured that they will get 'legal peace,' not just from class-action lawsuits, but from the kind of legislation represented by the California [Holocaust] Victim Insurance Relief Act." Pet. App. 124a.

In his letter to the Commissioner, Deputy Secretary Eizenstat criticized the HVIRA as having "the unfortunate effect of damaging the one effective means now at hand to process quickly and completely unpaid insurance claims from the Holocaust period, the International Commission on Holocaust Era Insurance Claims." SER 975. He further stated that actions by California that "threaten or result in sanctions against German insurers could complicate my ability to resolve the other claims against German companies for the benefit of Holocaust survivors." *Id.* at 976.

At the same time, ICHEIC urged the California Department of Insurance not to force five European insurers and their U.S. affiliates to testify on whether they would comply with the HVIRA. In response, California Assembly Member Wally

Knox, the sponsor of the HVIRA, wrote to Chairman Eagleburger (SER 973), asking him to refrain from "interfer[ing] with the resolute implementation of [the HVIRA] by seeking exclusions for companies that are participating" in ICHEIC. Mr. Knox maintained that any exclusions would contravene the HVIRA because, for California to establish "a complete registry of all policies written between 1920 and 1945," "no European Insurance company can be 'excused' from" having to report policy information. *Ibid.*

Deputy Secretary Eizenstat later explained in Senate testimony that California's actions under the HVIRA threatened to undermine ICHEIC (Pet. App. 136a-137a):

> I recently wrote to the state insurance commissioner[] in * * * California, emphasizing my strong support for the international efforts to create a claims settlement process under [ICHEIC] and stressing that, in [his] legitimate concern for Holocaust survivors, proposed action[] in th[is] state[] could undermine the work of the ICHEIC.

He underscored that the United States government's support of ICHEIC was "link[ed]" in important ways to its general "policy on Holocaust issues," which, in turn, furthers "important U.S. foreign policy interests" across Europe. Pet. App. 127a, 135a.

D. The Commissioner's Implementation Of The HVIRA.

Despite the federal government's pleas for non-interference, the State Insurance Commissioner announced a policy of immediate and rigorous enforcement of the HVIRA. ER 1060, 1065. He subpoenaed insurers to testify at hearings as to their readiness to comply and told the companies to either produce the required records or "leave the State." ER 1095.

At a hearing in December 1999, the Commissioner remarked that the issue of compensation for Holocaust-era insurance claims "will be resolved in California. I promised that for the last two years." ER 1060. The Commissioner then

offered his judgment that the international process for claims resolution "has not succeeded to this date, and California can't wait around any longer. It is your choice now whether you're going * * * to bring your company in full compliance, whether you're going to leave the state voluntarily, or whether I'm going to kick you out." ER 1097.

E. The Proceedings Below.

1. The preliminary injunction.

Faced with the imminent suspension of their California licenses, petitioners (insurers, reinsurers, and a national trade association of property and casualty insurers) filed suit to challenge the constitutionality of the HVIRA and sought injunctive relief.

The district court granted a preliminary injunction, holding that petitioners "ha[d] shown that irreparable harm will occur if the court does not enjoin enforcement of the HVIRA" (Pet. App. 113a) and that the HVIRA was likely to be facially unconstitutional on two grounds. First, the statute "intrude[s] into 'matters which the Constitution entrusts solely to the Federal Government.'" Pet. App. 96a-105a (quoting *Zschernig* v. *Miller*, 389 U.S. 429, 436 (1968)). Second, the HVIRA violates the Foreign Commerce Clause because it "potentially prevents the federal government from speaking with one voice in its expectations of foreign insurance companies" and impermissibly "meddl[es] in foreign commerce entirely outside its borders." Pet. App. 106a-110a. The court did not address petitioners' due process claims.

The Commissioner appealed and, in opposition to that appeal, the United States filed an *amicus* brief stating that the HVIRA "impairs the ability of the United States to conduct the nation's foreign policy," in violation of the Constitution's foreign affairs power. ER 807-808. The brief explained that "both Germany and Switzerland have protested to the State Department California's attempt to regulate the conduct of

German and Swiss insurers with respect to insurance policies written in those countries." *Ibid.* It also expressed serious doubt as to the HVIRA's validity under the Commerce Clause and concluded that the McCarran-Ferguson Act "does not shield a State's attempt to regulate insurance extraterritorially." ER 802. The Federal Republic of Germany also filed an *amicus* brief, stating that country's opposition to the HVIRA.

The Ninth Circuit overturned the district court's decision. Without mentioning the submissions by the United States and Germany, and dismissing the relevant international agreements as mere "executive branch initiatives," the court of appeals concluded that the HVIRA poses no conflict with U.S. foreign policy. Pet. App. 45a-59a. The court also questioned the validity of the foreign affairs doctrine, stating that *Zschernig* "has been applied * * * sparingly" and "does not govern" (*id.* at 56a-59a). In addition, the court held that the McCarran-Ferguson Act shields the HVIRA from Commerce Clause scrutiny because the HVIRA "is a California insurance regulation of California insurance companies that affects foreign commerce only indirectly." *Id.* at 45a. The court of appeals remanded for consideration of petitioners' other claims, while leaving the preliminary injunction in place.

2. The permanent injunction and reversal on appeal.

On remand, the district court found that the HVIRA does not exceed California's legislative jurisdiction under the Due Process Clause. Pet. App. 74a. The court concluded, however, that by mandating license suspension for non-performance of impossible tasks, the HVIRA deprives petitioners of a protected property interest without due process of law. Accordingly, it permanently enjoined enforcement of the statute. *Id.* at 75a-83a.

On appeal, the United States, Germany, and Switzerland filed *amicus* briefs in support of petitioners. The Ninth Circuit again reversed, holding that the HVIRA does not violate due process. The court of appeals also reaffirmed its prior decision

on petitioners' foreign affairs and Commerce Clause claims, concluding: "[w]e are not persuaded that we erred." *Id.* at 29a.

In support of a petition for rehearing, the United States once more informed the Ninth Circuit that the HVIRA implicates "significant foreign policy concerns" involving close allies of the United States and that the statute constitutes "not merely a theoretical, but an actual interference with the United States' conduct of foreign policy, that undermines the Constitution's exclusive grant to the national government of authority to conduct foreign policy." 2002 U.S. *En Banc Amicus* Brief 1, 15. Nonetheless, the court of appeals denied rehearing.

SUMMARY OF THE ARGUMENT

The State of California seeks to undermine international efforts led by the United States to resolve Holocaust-era insurance claims by extending its insurance code to impose onerous reporting requirements on European insurers to foster litigation in California courts. The conflict with U.S. foreign policy is direct and substantial, as is the regulatory burden on foreign insurers and the affront to the sovereignty of foreign governments. The HVIRA is unconstitutional on three grounds.

I. The statute invades the foreign affairs power of the federal government. The text and history of the Constitution, as well as necessary concomitants of national sovereignty, require that "the whole subject" of "relations" with "foreign nations" be entrusted exclusively to the federal government. *Chy Lung* v. *Freeman*, 92 U.S. 275, 280 (1875). To protect this singularly important federal power, this Court has held that a state statute that has "more than 'some incidental or indirect effect in foreign countries,'" or has "great potential for disruption or embarrassment" of U.S. foreign policy, is unconstitutional. *Zschernig*, 389 U.S. at 434-435.

The HVIRA is invalid under *Zschernig*, because it conflicts with U.S. foreign policy and its effect in foreign countries is direct and burdensome. The United States has entered into

international agreements to resolve Holocaust-era insurance claims in an international forum for the very purpose of avoiding litigation. These agreements are the culmination of years of multilateral negotiations seeking to ensure just compensation to Holocaust victims and final resolution of the issue for foreign insurers.

California has taken the opposite approach, seeking to impose unilaterally its own policy through insurance regulation and litigation in state court and thereby rendering illusory the "crucial" goal of "legal peace" for insurers. The HVIRA's impairment of U.S. foreign policy has generated strong protests from foreign governments. The state statute plainly infringes the federal government's foreign affairs power and cannot stand under *Zschernig*.

II. The HVIRA violates the Foreign Commerce Clause because it prevents the federal government from speaking with "one voice" in its commercial relations with foreign governments, *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 451 (1979), and because it is an extraterritorial regulation of foreign commerce, *Healy* v. *Beer Inst., Inc.*, 491 U.S. 324, 336 (1989).

The extraterritorial scope of the HVIRA is vast, as intended by the California legislature. The statute requires the production of information on millions of insurance policies issued decades ago in Europe — in violation of European privacy laws. The practical effect of the HVIRA is to compel European insurers to engage in specified extraterritorial conduct that contravenes governing foreign law. The statute cannot survive scrutiny under this Court's Commerce Clause precedents.

The Ninth Circuit held that Commerce Clause principles were inapplicable to the HVIRA because of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015. But as this Court held in *Federal Trade Comm'n* v. *Travelers Health Ass'n*, 362 U.S. 293 (1960), that federal statute does not shield a state's attempt to regulate insurance extraterritorially. The legislative history

of the McCarran-Ferguson Act confirms that Congress did not intend to allow the states to engage in extraterritorial insurance regulation.

III. California also lacks the minimum contacts with the parties and transactions regulated by the HVIRA that are required by due process to sustain the State's legislative jurisdiction. The burden of complying with the statute falls entirely on European insurers, which must undertake a continent-wide search for information on millions of insurance policies issued in Europe, by European insurers, to Europeans, to cover risks in Europe over a half century ago.

The only "nexus" that California can claim between the State and the parties and transactions regulated is that a few Holocaust survivors have moved to California in the decades since World War II. But this Court repeatedly has held that a post-transaction change of residence does not support a state's legislative jurisdiction. Moreover, the HVIRA cannot be justified as a routine licensing or fitness statute. It was not intended by the California legislature to serve such purposes and does not seek information relevant to a fitness inquiry.

ARGUMENT

I. THE HVIRA INFRINGES THE FEDERAL GOVERNMENT'S EXCLUSIVE AUTHORITY OVER THE NATION'S FOREIGN AFFAIRS

A. The Constitution Vests Exclusive Authority Over Foreign Affairs In The Federal Government.

1. The Constitution "entrusts" the Nation's foreign affairs "solely to the Federal Government." *Zschernig*, 389 U.S. at 436. This was the plan of the Framers, who were keenly aware of the serious problems that would arise if the Nation had a diffuse foreign policy spread among several governments. See *Oldfield* v. *Miller*, 51 U.S. (10 How.) 146, 164 (1850).

Under the Articles of Confederation, the Continental Congress lacked authority to prevent individual states from conducting their own foreign policy. See John Jay, *In An Address to the People of the State of New York on the Subject of the Constitution*, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 69, 72 (Paul Ford ed., 1971). As a result, individual states repeatedly caused foreign policy embarrassments. The turmoil created by these separate foreign policies was a "major drive wheel in the movement for constitutional reform." Frederick W. Marks, III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 50 (1973). "Nothing contributed more directly to the calling of the 1787 Constitutional Convention than did the spreading belief that under the Articles of Confederation Congress could not effectively and safely conduct foreign policy." Walter LeFeber, *The Constitution and United States Foreign Policy: An Interpretation*, 74 J. AM. HIST. 695, 697 (1987).

The debates in the Constitutional Convention reveal the prevailing view among the Framers that "[t]he states were not 'sovereigns' in the sense contended for by some. They did not possess the peculiar features of sovereignty — they could not make war, nor peace, nor alliances, nor treaties." Rufus King, 5 ELLIOTT'S DEBATES 212. The American people could not negotiate with foreign powers if each state was free to pursue its own foreign policy. As Alexander Hamilton explained: "No nation acquainted with the nature of our political association would be unwise enough to enter into stipulations with the United States, * * * while they were apprised that the engagements on the part of the Union might at any moment be violated by its members." THE FEDERALIST NO. 22, at 144 (Clinton Rossiter ed., 1961); see also George Sutherland, *The Internal and External Powers of the National Government*, 191 N. AM. REV. 1 (1910).

The text of the Constitution reflects this overriding concern, reserving preeminent authority over the Nation's foreign affairs to the federal government. See, *e.g.*, U.S. CONST. art. I, § 8, cls.

1, 3, 11 (granting Congress the authority to "provide for the common Defence," "regulate Commerce with foreign Nations," and "declare War"), art. II, §§ 2, 3 (granting the President authority to "make Treaties," "appoint Ambassadors," and "receive Ambassadors"). The Constitution further restricts the authority of the States to engage in foreign relations. See, *e.g.*, U.S. CONST. art. I, § 10 (States may not "enter into any Treaty, Alliance, or Confederation," "lay any Imposts or Duties on Imports or Exports," "enter into any Agreement * * * with a foreign Power," or "engage in War").

Even if the Constitution did not make these affirmative grants of authority to the federal government, "[t]he powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, * * * would have vested in the federal government as necessary concomitants of nationality." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

2. In light of this history, the text of the Constitution, and the essential requirements of a sovereign national government, this Court has long shown "concern for uniformity in this country's dealings with foreign nations." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427 n.25 (1964).

The exclusive character of the federal foreign affairs power was articulated in a series of cases beginning with *Chy Lung*, 92 U.S. at 275, which held that the Constitution entrusts "the whole subject" of "relations" with "foreign nations" to the federal government and prohibits the States from taking acts with respect to other countries for which the entire Nation might be held responsible. *Id.* at 280. The Court in *Chy Lung* struck down a state law that, without targeting any particular nation or government, permitted a state immigration commissioner to require a bond to admit an alien who might become a public charge because of her status as a pauper, an infirmed person, or a "lewd or debauched woman." *Id.* at 278. Because the state law gave insult to the Emperor of China, it implicated

powers that were available only to the federal government — even in the absence of a preemptive federal treaty, statute, or policy. *Ibid.*

Subsequent decisions have consistently reflected this view, describing the federal government's authority over foreign relations as "full and exclusive," "entirely free from local interference," *Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941), and "not shared by the States [but] vested in the national government exclusively." *United States* v. *Pink*, 315 U.S. 203, 233 (1942); see also *United States* v. *Belmont*, 301 U.S. 324, 330 (1937) ("[g]overnmental power over external affairs is not distributed, but vested exclusively in the national government"). This line of cases culminated in *Zschernig*, 389 U.S. at 434-435, which held that state statutes having "more than some incidental or indirect effect in foreign countries," or having "great potential for disruption or embarrassment" of U.S. foreign policy, are unconstitutional.

In *Zschernig*, the Court addressed the validity of a state probate law that blocked the distribution of an estate to a foreign heir if the property was subject to confiscation by foreign officials. No international negotiations or federal statutes or treaties bore on the subject; the law involved an area "traditionally regulated" by the states; and the United States government denied that it "interfere[d] with [its] conduct of foreign relations." 389 U.S. at 434. This Court nonetheless struck down the state statute. Noting that application of the statute would require "inquiries concerning the actual administration of foreign law [and] into the credibility of foreign diplomatic statements," the Court reasoned that this "intrusion by the State into the field of foreign affairs" threatened to "adversely affect the power of the central government to deal with those problems [of foreign relations]." *Id.* at 432, 441.

Since *Zschernig*, this Court repeatedly has reaffirmed that the federal foreign affairs power is "exclusive" of state power. See *Perpich* v. *Department of Defense*, 496 U.S. 334, 353

(1990) ("constitutional provisions commit matters of foreign policy and military affairs to the exclusive control of the National Government"); *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 92 n.7 (1984) ("[t]he need for a consistent and coherent foreign policy * * * is the exclusive responsibility of the Federal Government"); *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 465 n.15 (1978) (the "exclusive foreign relations power [is] expressly reserved to the Federal Government"). "[W]hatever the division of foreign policy responsibility within the national government, all responsibility is ultimately reposed at the national level rather than dispersed among the states and localities." 1 Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 4-5, at 656 (3d ed. 2000).

This Court's most recent discussion of the federal foreign affairs power was in *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000), which invalidated a Massachusetts statute that, by interjecting the State into a foreign policy matter, deprived the President of economic and diplomatic leverage in international negotiations. While ultimately resting its decision on federal preemption, the Court condemned state interference with foreign policy negotiations and noted that "similar concerns" have animated the Court's cases under the foreign affairs power. *Id.* at 381-382 n.16. "It is not merely that the differences between the state and federal Acts * * * threaten to complicate discussion; they compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments." *Id.* at 385. The Court explained that the state law imposing economic sanctions on companies doing business with Burma, if enforceable, would deprive the President of "economic and diplomatic leverage" in negotiations with Burma. *Id.* at 387. The Court concluded that "the President's maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy, without exception for enclaves fenced off willy-nilly by inconsistent political tactics." *Ibid.*

B. The HVIRA Unconstitutionally Infringes The Federal Government's Foreign Affairs Power.

Any state law with more than an "incidental or indirect effect in foreign countries" or with "great potential for disruption or embarrassment" of U.S. foreign policy is unconstitutional — "even in the absence of" a federal statute, a treaty, or international negotiations bearing on the subject. *Zschernig*, 389 U.S. at 441; accord *Chy Lung*, 92 U.S. at 280. In this sense, the foreign affairs power is analogous to field preemption, reserving "the whole subject of [foreign] relations" to the national government (*Chy Lung*, 92 U.S. at 280) and guaranteeing that "the United States is speaking with one voice" (*Crosby*, 530 U.S. at 382 n.16). It bars the states from passing laws that might "embroil us in disastrous quarrels with other nations" (*Chy Lung*, 92 U.S. at 280) or from undertaking "uncoordinated responses that can put the U.S. on the political defensive." *Crosby*, 530 U.S. at 382 n.16. "[T]he interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Hines*, 312 U.S. at 63.

The HVIRA has more than an "incidental or indirect effect in foreign countries" and has "great potential for disruption or embarrassment" of U.S. foreign policy. The conflict between the HVIRA and U.S. foreign policy is immediate and substantial and the effect of the state statute in foreign countries is direct and burdensome.

The United States has negotiated agreements with Germany and Austria and a Joint Statement with Switzerland that represent the culmination of decades of diplomatic efforts to obtain compensation for Holocaust victims. The allocation of responsibility for Nazi-era wrongs is quintessentially a matter of foreign policy, in which the federal government has a continuing and exclusive interest. It was the United States that waged World War II, defeated Nazi Germany, and rehabilitated

Germany under the Marshall Plan. And it is the United States that has been engaged for decades in multilateral negotiations to ensure just compensation to Holocaust victims and final resolution of the issue for foreign insurers.

United States foreign policy and the international agreements produced thereunder seek to resolve — once and for all — property claims arising out of the Nazi era. The overarching goal of "all embracing and enduring legal peace" depends entirely on the establishment of an "exclusive remedy and forum" for resolving Holocaust-era claims, including insurance claims. Pet. App. 153a-155a.

It is difficult to overstate the conflict between the federal approach and that of California. The federal solution rests on the premise that relief for *all* Holocaust-era claimants is best achieved if claims are resolved in an international forum; the California solution rests on the notion that foreign insurers may be called to account on a *piecemeal* basis in the courts of the 50 states.[2] The United States believes that European insurers should be required to pay claims only *once*, from a single fund containing a pre-determined sum; California believes that insurers may be forced to pay *twice* in undisclosed amounts solely out of their own pockets. The premise of the United States' agreements is that payment for wrongs committed overseas during a world war is a matter of exclusive *federal* concern; the premise of the HVIRA is that *states* may assert control over foreign companies that have never done business within their borders for acts committed on another continent more than 60 years ago.

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[2] This is not an academic concern: seven states have enacted legislation similar to the HVIRA (Arizona, Florida, Maryland, Minnesota, New York, Texas, and Washington) and four states have introduced similar legislation (Illinois, Massachusetts, New Jersey, and Rhode Island). See Brief for the Federal Republic of Germany as *Amicus Curiae* in Support of Petitioners, Nos. 02-722, 02-733, 13 ("FRG *Amicus* Br.").

In short, just as the United States and European nations have reached closure on exclusive procedures to resolve Nazi-era insurance claims through international institutions, California seeks to impose its own solution through California insurance regulation and California litigation, rendering illusory the goal of "legal peace." The conflict with U.S. foreign policy could not be more clear.

Indeed, the stated goal of the HVIRA is to affect foreign policy — to "encourage the development of a resolution to these [Holocaust-era insurance] issues through the international process or through direct action by the State of California, as necessary." Cal. Ins. Code § 13801(f). While this *goal* may appear to be consonant with U.S. policy, the *means* selected by California lawmakers — imposition of onerous disclosure requirements to facilitate drawn-out litigation — are directly contrary to the premise of federal negotiations with foreign nations, which is to resolve *all* claims expeditiously under the terms of international agreements. See *Crosby*, 530 U.S. at 379-380 (noting that the Massachusetts Burma Act conflicted with federal policy despite having "a common end"). In fact, the means selected have an enormous impact overseas. The HVIRA imposes a draconian penalty on any California insurer whose European affiliates fail to make the burdensome investigation and disclosures required by the statute — to the point of requiring such companies to violate European privacy laws. See Brief FRG *Amicus* Br. 4; Brief of Government of Switzerland as *Amicus Curiae* in Support of Petitioners, No. 02-722, 3-4, 7 ("Swiss *Amicus* Br.").

The conflict between the California statute and U.S. foreign policy implicates international issues that go to the very heart of the United States' relationship with its European allies, as described by Deputy Secretary Eizenstat. Pet. App. 126a-127a. The seriousness of the conflict between the HVIRA and U.S. foreign policy is indicated by the *amicus* briefs filed by the United States, Germany, and Switzerland, which strenuously object to the HVIRA.

The United States has stated unequivocally that the HVIRA "interferes with the national government's authority over foreign affairs in general, and with its traditional role in addressing claims arising out of international conflicts in particular." U.S. *Amicus* Br. 2. The statute "undermines the United States' effective conduct of foreign relations, including its continuing efforts to secure compensation for surviving Holocaust victims within their lifetimes." *Id.* at 8.

The German government has voiced the same objections, stating that the HVIRA is an "intrusion on German sovereignty and impede[s] the Federal Republic's ability to engage in diplomatic relations with the United States as a unitary political entity." FRG *Amicus* Br. 3. The HVIRA has a "direct, significant effect on Germany." *Id.* at 11. If German insurers "fail to comply with the publication requirements, the California insurance companies to which they are now affiliated (some 55 to 80 years after the issuance of the policies) will lose their licenses to do business in the State of California." *Ibid.* Moreover, the HVIRA undermines the Executive Agreement on the German Foundation by "replacing the international consensus on nonconfrontational resolution [of Holocaust-era claims] through the German Foundation with a scheme premised on coerced publication and litigation in California." *Ibid.*[3]

The HVIRA obviously has "more than some incidental or indirect effect in foreign countries" and presents "great potential" — indeed, actuality — "for disruption or embarrassment" of U.S. foreign policy. *Zschernig*, 389 U.S. at 434-435. The Constitution does not permit California to adopt its own foreign policy on compensation for Holocaust-era insurance claims — whether or not the California Insurance Commissioner believes

[3] The Swiss government similarly has declared that the HVIRA "will have a significant effect on the foreign relations of the United States and Switzerland," and will "compel the violation of Swiss sovereignty and Swiss privacy laws." Swiss *Amicus* Br. 3-4

that the federal government's effort "has not succeeded to this date, and California can't wait around any longer." ER 1097.

C. The Ninth Circuit's Reasons For Not Applying *Zschernig* Are Groundless.

1. The Ninth Circuit — without even mentioning the *amicus* briefs filed by the United States, Germany, and Switzerland objecting to the HVIRA — dismissed the federal government's international agreements on Holocaust-era insurance claims as mere "executive branch initiatives." Pet. App. 53a. Even if these agreements are completely discounted, however, the federal government's exclusive authority over the Nation's foreign affairs would nonetheless invalidate the HVIRA. As described above (at 21-23), the foreign affairs power applies even in the absence of a federal statute, treaty, or international negotiations bearing on the subject of the challenged state law. *Zschernig*, 389 U.S. at 441; accord *Chy Lung*, 92 U.S. at 280.

The existence of executive agreements that actually conflict with the HVIRA makes application of the foreign affairs power more compelling. Executive agreements have the same force as treaties or statutes: "The supremacy of a treaty" over "state laws or policies" has been "recognized from the beginning. * * * '[A]ll international compacts and agreements' are to be treated with similar dignity for the reason that 'complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states.'" *Pink*, 315 U.S. at 223 (quoting *Belmont*, 301 U.S. at 331).

This Court repeatedly has affirmed the President's power to enter into executive agreements with foreign nations, even in the absence of an explicit delegation of authority by Congress, despite any effects the agreements might have on claims pending in state courts. *Dames & Moore* v. *Regan*, 453 U.S. 654, 682 (1981) ("there has also been a longstanding practice of [settling claims of U.S. nationals by] executive agreement without the advice and consent of the Senate"); *Belmont*, 301

U.S. at 330 (that "agreements" with foreign countries are "within the competence of the President may not be doubted"); *Pink*, 315 U.S. at 223 (same); *Curtiss-Wright*, 299 U.S. at 318 (the power to make executive agreements "exist[s] as inherently inseparable from the conception of nationality").

As the Court explained in *Dames & Moore*, the validity of an executive agreement made by the President "hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action, including 'congressional inertia, indifference, or quiescence.'" *Id.* at 668-669 (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). In light of the President's own considerable constitutional authority in the field of foreign relations, congressional acquiescence in or tacit approval of the President's action removes any doubt. *Dames & Moore*, 453 U.S. at 688; *Pink*, 315 U.S. at 227; see *Crosby*, 530 U.S. at 380 (the President's power to conduct foreign policy is "at its maximum" when he acts "pursuant to an express *or implied* authorization of Congress").

In *Dames & Moore*, the President suspended certain legal claims against the Iranian government by Executive Order and required claimants to pursue remedies before an international tribunal. This Court acknowledged that the Executive Order was not specifically authorized by any statute. 453 U.S. at 677. Nonetheless, the Court upheld the President's action, based on the "general tenor of Congress's legislation in this area" (*id.* at 678) and the fact that Congress had held hearings on the Order and had not "enacted legislation, or even passed a resolution, indicating its displeasure with the Agreement" (*id.* at 687). The same considerations apply in this case.

In concluding the Executive Agreements with Germany and Austria, the President acted with at least the implied approval of and acquiescence by — if not an express delegation of power from — Congress, as well as his independent constitutional

authority as the "sole organ of the nation in its external relations, and its sole representative with foreign nations." *Curtiss-Wright*, 299 U.S. at 319 (quoting John Marshall, 6 Annals of Cong. 613 (1800)).

In 1998, Congress enacted a statute requiring the President to study the issue of unpaid Holocaust-era claims and to recommend "legislative, administrative, or other action that the President considers necessary or appropriate" to resolve issues pertaining to the disposition of Holocaust-era assets in the United States, including unpaid insurance policies. U.S. Holocaust Assets Commission Act of 1998, Pub. L. No. 105-186, § 3(d)(2), 112 Stat. 611 (codified at 22 U.S.C. § 1621 note).[4] The statutory reference to "administrative, or other action that the President considers necessary or appropriate," in addition to proposals for legislation, clearly indicates Congress's understanding that the President would proceed where appropriate through administrative and diplomatic channels.

Like the federal Burma law at issue in *Crosby*, this statute constituted "Congress's express command to the President to take the initiative for the United States among the international community." 530 U.S. at 388. In the words of the author of the insurance portion of the statute, it was designed to "ensure that at least [the President and Congress] will begin to get to the bottom of the unpaid insurance claims." 144 Cong. Rec. H4271 (daily ed. June 9, 1998) (statement of Rep. Foley); see 145 Cong. Rec. H9255 (daily ed. Oct. 4, 1998) (statement of Rep. LaFalce) ("We are united in full support of [Deputy Secretary]

[4] The court of appeals found that this statute "encouraged laws like HVIRA." Pet. App. 50a. But the statute does nothing of the sort. The Act established a *federal* Commission to examine the disposition of Holocaust-era assets in the United States. The Commission issued a report *that makes no mention of state regulation.* As the United States has explained (U.S. *Amicus* Br. 19-20 n.8), "[n]othing in the Act imposes reporting requirements on insurers under threat of sanctions, confers any new authority on the States to do so, or seeks the sort of private information that may be protected from disclosure under foreign law."

Eizenstat on th[e] process" of securing just compensation for Holocaust victims). These expressions of intent to empower the President to investigate and resolve Holocaust-era insurance claims, along with the plain language of the statute, can only be understood as approval of, or acquiescence in, the Executive Branch's efforts in this area. See *Dames & Moore*, 453 U.S. at 678-679.

Moreover, as evidenced by the extensive testimony by Deputy Secretary Eizenstat and Ambassador Bell on multiple occasions before the House and the Senate, Congress has been comprehensively advised of, and has fully acquiesced in, the Executive Branch's initiatives on Holocaust-era insurance claims, including exclusive reliance on ICHEIC and the necessity of providing legal closure for affected insurers.

2. The Ninth Circuit also questioned *Zschernig*'s current vitality (Pet. App. 59a), but the court failed to note this Court's numerous approving references to the foreign affairs doctrine, including most recently in *Crosby*, 530 U.S. at 381-382 n.16. Beyond its disparagement of *Zschernig*, the Ninth Circuit offered four points that supposedly distinguished that case. None is persuasive.

First, the court of appeals noted that here "[n]o Plaintiff is a foreign government." Pet. App. 58a. But that does not distinguish this case from earlier foreign affairs cases. *Chy Lung* involved insulting treatment of Chinese nationals in the United States; *Zschernig* involved the rights of individuals in Communist countries to inherit property in Oregon; in neither case was a foreign government a party. "Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted or permitted by a government." *Zschernig*, 389 U.S. at 441. The President must be able to negotiate with respect to foreign subjects as well as foreign nations.

Second, the court observed that the "HVIRA does not refer to any particular country." Pet. App. 58a. But neither did the law in *Zschernig*. In any event, the HVIRA on its face *is* directed toward specific European countries and reflects a judgment that the judicial process and regulatory authority of those countries — notably Germany — cannot be trusted.

Third, the court stated (Pet. App. 58a) that "there is no evidence that HVIRA would be applied in a way that would implicate the diplomatic [matters] mentioned in *Zschernig*." This statement is inexplicable. If *amicus* briefs by the United States and foreign governments and protests by federal officials to the Governor and the Insurance Commissioner do not constitute such evidence, it is hard to imagine what would. This is precisely the evidence on which this Court relied in *Crosby* to substantiate the "threat to the President's power to speak and bargain effectively with other nations." 530 U.S. at 382.

Fourth, the court noted that this is a facial challenge and *Zschernig* was not. But *Zschernig* involved a law that, on its face, did not regulate extraterritorially or pass judgment on foreign affairs. Only in light of its application by Oregon courts was the statute revealed as violating the foreign affairs power. 389 U.S. at 433. Here, the *very purpose* of the HVIRA is to interfere with the international means for resolving Holocaust-era claims, and it has generated protests from the United States, Germany, and Switzerland. *Zschernig*'s emphasis on the "potential" for disruption of U.S. foreign policy confirms that there is no need for additional proof of actual adverse effects.

II. THE HVIRA VIOLATES THE FOREIGN COMMERCE CLAUSE AND IS NOT SHIELDED BY THE McCARRAN-FERGUSON ACT

A. The HVIRA Cannot Be Squared With Fundamental Commerce Clause Principles.

The Foreign Commerce Clause, U.S. Const. art. I, § 8, cl. 3, like its interstate counterpart, provides "'protection from

state legislation inimical to the national commerce where Congress has not acted.'" *Barclays Bank PLC* v. *Franchise Tax Board*, 512 U.S. 298, 310 (1994) (quoting *Southern Pac. Co.* v. *Arizona*, 325 U.S. 761, 769 (1945)). Indeed, it is "a well-accepted rule that state restrictions burdening foreign commerce are subjected to a more rigorous and searching scrutiny" than are regulations of interstate commerce (*Wunnicke*, 467 U.S. at 100), because "with respect to foreign intercourse and trade[,] the people of the United States act through a single government with unified and adequate national power." *Barclays Bank*, 512 U.S. at 311 (citations and internal quotation marks omitted). As a consequence, "the courts have regularly viewed with great suspicion any state action that impinges on foreign commerce," subjecting such enactments "to 'vigorous and searching scrutiny' under the dormant Commerce Clause doctrine." Boris I. Bittker, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 10.03, at 10-6, 10-7 (1999).

The HVIRA, of course, was designed to compel conduct by commercial actors that operated, and are now operating, in foreign nations. Its central purpose is to require — directly or indirectly — the disclosure by foreign entities of commercial data relating exclusively to foreign commercial transactions. And it does so in aid of a broader statutory regime intended to modify the contractual obligations of foreign businesses arising out of those transactions. This interference with foreign commerce runs afoul of the Foreign Commerce Clause in two respects: it precludes the federal government from speaking with "one voice" in its commercial relations with foreign governments, see *Japan Line*, 441 U.S. at 451, and it constitutes impermissible extraterritorial state regulation of commerce, see *Healy*, 491 U.S. at 336.

1. *The HVIRA fails the Foreign Commerce Clause's "one-voice" test.*

A basic purpose of the Foreign Commerce Clause, articulated repeatedly by the Framers, is to prevent individual states from embroiling the United States in disputes with foreign nations, a prospect that could lead to retaliation by foreign countries against American commercial interests. See, *e.g.*, THE FEDERALIST NO. 44, at 281 (James Madison) (Clinton Rossiter ed., 1961) (noting "the advantage of uniformity in all points which relate to foreign powers"). The Foreign Commerce Clause thus proscribes any state law that "prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'" *Japan Line, Ltd.*, 441 U.S. at 434 (quoting *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 285 (1976)); see *Barclays Bank*, 512 U.S. at 320-330. This principle was reaffirmed in *Crosby*, 530 U.S. at 381-382 n.16, with explicit citation to *Japan Line*. As with the foreign affairs power, the Foreign Commerce Clause's "one-voice" test thus requires invalidation of any state statute that "implicates foreign policy issues which must be left to the Federal Government." *Container Corp. of Am.* v. *Franchise Tax Bd.*, 463 U.S. 159, 194 (1983); *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1851) (states may not legislate in areas "imperatively demanding a single [national] rule.").

The HVIRA fails the "one-voice" test because, as explained above, the Executive Branch has spoken with full authority for the Nation on the issue of Holocaust-era insurance claims and the state statute interferes with the effectuation of a coherent national policy on that issue. The federal government has endorsed exclusive and effective remedies for victims of the Holocaust. Those efforts cannot succeed if individual states may interpose their own divergent objectives and requirements. In these circumstances, the HVIRA impermissibly undermines the federal government's attempt to set a uniform national policy. See 1 Tribe, *supra*, § 6-24, at 1152 ("[i]f state action

touching foreign commerce is to be allowed, it must be shown not to affect national concerns to any appreciable degree").

The damage to the Nation's commercial interests is compounded by the fact that the HVIRA imposes substantial burdens on foreign insurers, overrides (and purports to require the violation of) foreign privacy laws, and has prompted vigorous complaints from affected foreign governments. FRG *Amicus* Br. 3-4, 11; Swiss *Amicus* Br. 3-4, 7. And the statute's effects are especially pernicious because it imposes unique, discriminatory burdens on foreign companies that engaged in business in specified foreign countries; the dangers of protectionism and commercial warfare posed by such discriminatory laws are so profound that, even in the interstate context, they have been held to be "virtually per se invalid." *Oregon Waste Sys., Inc.* v. *Dep't of Env. Quality*, 511 U.S. 93, 99 (1994). Under these circumstances, the HVIRA presents a "risk of retaliation" that "is acute, and such retaliation of necessity would be felt by the Nation as a whole." *Japan Line*, 441 U.S. at 453. California, "by its unilateral act, cannot be permitted to place these impediments before this Nation's conduct of its foreign relations and its foreign trade." *Ibid.* For that reason alone, the HVIRA should be invalidated.

2. *The HVIRA is an extraterritorial regulation in violation of the Foreign Commerce Clause.*

It is equally fundamental that the Foreign Commerce Clause precludes the application of state legislation to commercial practices "wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy*, 491 U.S. at 336 (quoting *Edgar* v. *MITE Corp.*, 457 U.S. 624, 642-643 (1982)); accord, *e.g.*, *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 393 (1994). For example, a state may not "impose economic sanctions on violators of its laws with the intent of changing [the affected party's] lawful conduct in other States," nor "may [a state] impose sanctions * * * in order to deter conduct that is lawful in other jurisdictions." *BMW of*

North Am., Inc. v. *Gore*, 517 U.S. 559, 572, 573 (1996). In determining whether a state law is an impermissible extraterritorial regulation for Commerce Clause purposes, "[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336.

It seems self-evident that the HVIRA falls under this standard. Its purpose is to require the production from European archives of detailed information about millions of insurance contracts issued by European insurers. All of the subject policies were issued in Europe by European insurers; any losses under those policies occurred in Europe and were suffered by Europeans. ER 1012-1013, 1044-1045.

Despite these features, the Ninth Circuit held that the HVIRA is not an extraterritorial regulation: it opined that the statute "is a California insurance regulation of California insurance companies that affects foreign commerce only indirectly." Pet. App. 45a. The court of appeals concluded that requiring European insurance companies to produce voluminous data does not "regulat[e]" them, *id.* at 16a, 44a, and that the HVIRA has the salutary domestic effects of "help[ing] California residents recover on unpaid policies" and "protect[ing California] * * * residents from insurance companies that have not paid valid insurance claims," *ibid.* This analysis is flawed at every turn.

First, demanding the production of voluminous confidential information unquestionably *is* a form of regulation. See *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 28 (1990) ("rules which require regulated entities to disclose information" are "regulatory tools available to [the] Government"); U.S. *Amicus* Br. 11-12. No one would deny, for example, that requiring issuers of securities to "report" detailed information on their business operations to the Securities and Exchange Commission "regulates" those companies; the HVIRA has precisely the same character. And the HVIRA certainly is no less of a

regulatory burden than any of the other reporting obligations that the federal and state governments impose. Indeed, it is doubtful that the Ninth Circuit really believed its contrary declaration here; the court elsewhere acknowledged that "[s]eeking information from insurers about their claims-paying record, to be used in the licensing process, is a form of regulating the business of insurance." Pet. App. 45a n.3.

Second, and more fundamentally, the HVIRA's regulatory effect is extraterritorial. As we have noted, the statute was *intentionally* drawn to have extraterritorial effect. The HVIRA is part of — and has, as its sole justification, the goal of advancing — a larger legislative agenda that effectively regulates the administration of foreign insurance contracts. By modifying the applicable statute of limitations, dictating the treatment of currency devaluations,[5] and permitting suits in California, see pages 11-12, *supra*, the legislation recasts the terms of insurance contracts entered into between *foreign* nationals, in *foreign* countries, that are subject to *foreign* laws. There is no denying that this treatment has "a sweeping extraterritorial effect." *MITE Corp.*, 457 U.S. at 642.

Even viewed in isolation, the HVIRA projects California's economic regulation in a manner that "control[s] conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336. The HVIRA requires California-licensed insurers to obtain information held by related foreign entities that are not themselves subject to California's jurisdiction. As a practical matter, the statute requires companies that are *beyond* California's

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[5] The HVIRA redefines "proceeds" in a manner inconsistent with the law governing the policies when they were executed. See Cal. Ins. Code § 13802(c) ("proceeds" of insurance policies under the HVIRA are "the face value or other payout value * * * plus reasonable interest to date of payment[,] without diminution for wartime or immediate postwar currency devaluation"). This definition rewrites European insurance policies so that insurers that have fully paid benefits under pre-1945 policies pursuant to governing foreign law may nevertheless be subject to the claim that they have failed to pay the "proceeds" under California's revisionist definition.

borders to engage in specified extraterritorial conduct (including reporting on and certifying their "due diligence" overseas).[6]

It is a transparent fiction for the State to assert otherwise. As the German government has explained (FRG *Amicus* Br. 11), the HVIRA "improperly leverage[s California's] regulatory authority over insurance companies doing business" in the State so as "to regulate the conduct of 'related' insurance companies in Europe that have never done business in the state and are under the regulatory jurisdiction of Germany." And the HVIRA does so even though the required insurance documents and information are protected by European privacy laws.

The extraterritorial effect of the HVIRA is clear in an area in which the United States must speak with "one voice."[7] California is "impos[ing] economic sanctions" to change "lawful conduct in other [jurisdictions]" (*BMW*, 517 U.S. at 572). Whether the HVIRA also has some impact in California is irrelevant under this Commerce Clause principle, which "'precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.'" *Healy*, 491 U.S. at 336.[8]

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[6] For example, petitioner American Re-Insurance Company ("AmRe") must file a report under the HVIRA. Yet AmRe did no business in Europe between 1920 and 1945. ER 699-702. Nor did its parent, American Re Corporation. *Ibid.* AmRe must file a report because its parent was acquired in 1996 by Munich Re, which also sold no Holocaust-era policies, but which, long after World War II, acquired non-controlling interests in other companies that did. Those companies have no contacts with California. They have told AmRe that disclosing the information required by the HVIRA would violate German law and subject them to criminal prosecution. *Ibid.*

[7] If California can regulate foreign insurance policies to require public disclosure of personal information about the policyholders, then Pennsylvania or Colorado can regulate them as well to require privacy. The potential conflict highlights the extraterritorial reach of the HVIRA and the need for a single national policy on this issue.

[8] We note that the two potential effects of the HVIRA in California identified by the Ninth Circuit (see Pet. App. 44a) are marginal compared to the immense extraterritorial burden imposed by the statute. First, there is no evidence in the record that the statute will protect California "residents from insurance companies that have not paid valid insurance claims." *Ibid.* Neither the text of the HVIRA nor its legislative history even hints that this goal was contemplated by the California legislature, see pages 9-13, *supra*, and there are no facts to suggest that this will be an unintended benefit of the statute, see pages 48-50, *infra*. In reality, the undifferentiated mass of information called for by the HVIRA will not provide any insight into the claims-payment practices of European insurers. Second, the fact that a tiny fraction of the world's population of Holocaust survivors moved to California after 1945 is constitutionally insufficient to provide the State with authority to impose vast reporting requirements on European insurers that have no connection to the State, see pages 46-47, *infra*. At the end of the day, any speculative in-state benefits of the HVIRA are far outweighed by the burden imposed on the federal government's regulatory interests and on European insurers required to produce information in violation of European privacy laws. FRG *Amicus* Br. 3-4; Swiss *Amicus* Br. 3. Compare *CTS Corp.* v. *Dynamics Corp. of Am.*, 481 U.S. 69, 92-93 (1987).

B. The McCarran-Ferguson Act Does Not Shield The HVIRA From The Foreign Commerce Clause.

Against this background, the Ninth Circuit did not deny that application of ordinary Commerce Clause principles would require invalidation of the HVIRA. The court held that those principles were wholly inapplicable here, however, because it believed that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, shields the HVIRA's regulation of the overseas activities of European insurance companies from the reach of the Clause (Pet. App. 40a-45a). That holding is indefensible: the McCarran-Ferguson Act does not validate a state's attempt to regulate insurance extraterritorially. The federal statute therefore cannot defeat the argument that the HVIRA's impact overseas runs afoul of the Commere Clause's "one-voice" and extraterritoriality principles.

That conclusion is compelled by the Court's holding in *Federal Trade Comm'n* v. *Travelers Health Ass'n*, 362 U.S. 293 (1960). Construing Section 2(b) of the Act, 15 U.S.C. § 1012(b), which provides that specified federal laws apply "to the business of insurance to the extent that such business is not

regulated by state law," *Travelers* held that the Act does not extend to extraterritorial regulation. See 362 U.S. at 299-302. The Court found it "clear that [the Act] viewed state regulation of insurance solely in terms of regulation by the law of the State where occurred the activity sought to be regulated. There was no indication of any thought that a State could regulate activities carried on beyond its own borders." *Id.* at 300.

That rule is dispositive here. The HVIRA has a broad "extraterritorial reach," "impos[ing] regulatory requirements on corporations that have never done business in California with respect to policies issued to foreign nationals who themselves have no connection to California." 2001 U.S. *Amicus* Br. 14, 20. Indeed, the very purpose of the HVIRA is to require the compilation and disclosure of voluminous materials by foreign entities that are not subject to California's jurisdiction and that in many instances have had no contact with the State at all. And the HVIRA does so even though, as the German and Swiss governments have explained, keeping insurance documents private is *required by* German and Swiss law and unauthorized disclosure is punishable with criminal sanctions.

The Ninth Circuit recognized that it could not uphold the HVIRA without distinguishing this Court's decision in *Travelers*. The court of appeals' effort to do so, however, deviates from this Court's unambiguous holding.

The Ninth Circuit reasoned that the limits on state authority to enact extraterritorial insurance regulations recognized in *Travelers* apply only in cases involving Section 2(b) of the Act and have no bearing on cases concerning Section 2(a), 15 U.S.C. § 1012(a). See Pet. App. 41a-45a. Section 2(b) provides that specified federal statutes "shall be applicable to the business of insurance to the extent that *such business is not regulated by state law*"; its companion paragraph, Section 2(a), provides that the business of insurance "shall be subject to the laws of the several States *which relate to the regulation* * * * *of such business*," protecting those state laws from attack under

the Commerce Clause. In drawing a sharp distinction between the scope of these two similarly worded provisions, the court of appeals concluded that Congress in the Act (and this Court in *Travelers*) *did not* intend federal statutory law to be displaced by extraterritorial state insurance regulations, but *did* intend to set aside federal Commerce Clause requirements insofar as they apply to those same extraterritorial state regulations.

This peculiar reasoning is insupportable. To begin with, as the United States explained below, the plain language of the Act makes no distinction between the body of state laws described by the Act's two subsections. "Paragraphs (a) and (b) [of Section 2 of the Act] are * * * mirror images": the specified federal laws described in Section 2(b) apply to the business of insurance "unless the insurance business at issue is already regulated by the State as contemplated by paragraph (a). There is no apparent basis for the * * * contention that the language of paragraph (b), 'regulated by State law,' means anything other than the 'laws of the * * * States which relate to the regulation * * * of [insurance],' described in paragraph (a)." 2001 U.S. *Amicus* Br. 30. This means, of course, that state laws like those held in *Travelers* to be outside the scope of Section 2(b) because they are extraterritorial also necessarily must be unprotected by Section 2(a).

The central purpose of the McCarran-Ferguson Act confirms that Congress did not intend to authorize extraterritorial state insurance regulation. The Act was passed "in response to this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944)" (*United States Dep't of Treasury* v. *Fabe*, 508 U.S. 491, 499 (1993)), which held for the first time that insurance transactions are subject to the federal commerce power; "[t]here is no question that the primary purpose of the McCarran-Ferguson Act was to preserve state regulation of the activities of insurance companies, as it existed before the *South-Eastern Underwriters* case." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 219 n.18 (1979). Congress made clear that it did not intend the Act

to give the states "any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the South-Eastern Underwriters Associations case." H.R. Rep. No. 142, 79th Cong., 1st Sess. 3 (1945).

Prior to *South-Eastern Underwriters*, this Court had held specifically and repeatedly that states do *not* have authority to regulate or tax the extraterritorial activities of insurance companies. See *Connecticut Gen. Life Ins. Co.* v. *Johnson*, 303 U.S. 77, 81 (1938) (Stone, J.) (State lacks the "power to tax or regulate the corporation's property and activities elsewhere," even where "the corporation enjoys outside the state economic benefits from transactions within it"); *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U.S. 346, 349 (1922) (Holmes, J.) ("It is true that the State may regulate the activities of foreign [insurance] corporations within the State but it cannot regulate or interfere with what they do outside."); *Allgeyer* v. *Louisiana*, 165 U.S. 578, 591-592 (1897) (State lacks authority to regulate where the insurance "contract [was] made outside of the state," "to be performed outside of such jurisdiction"). Indeed, as the Court explained in *Travelers*, the House report on the Act specifically cited and approved these decisions, declaring that the "'continued regulation and taxation of insurance by the States'" should be subject

> to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer* v. *Louisiana* (165 U.S. 578), *St. Louis Cotton Compress Co.* v. *Arkansas* (260 U.S. 346), and *Connecticut General Insurance Co.* v. *Johnson* (303 U.S. 77), which hold, inter alia, that a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the State or to regulate such transactions in any way.

362 U.S. at 300-301 (quoting H.R. Rep. No. 142, *supra*, at 3).

The decision below cannot be squared with this clear expression of legislative intent. Congress believed that states lacked authority to engage in extraterritorial insurance regulation, and it left no doubt that the McCarran-Ferguson Act was not intended to expand state authority in that regard.

The Ninth Circuit also attempted to distinguish *Travelers* on the ground that the decision involved state laws that "sought to regulate directly the conduct of an insurer in another jurisdiction," while the HVIRA "seeks only to obtain information about conduct in another jurisdiction." Pet. App. 41a-43a. But *Travelers* is expressly premised on Congress's recognition that states lack authority to assert extraterritorial control over insurance companies. That is just what California is attempting to do under the HVIRA: require foreign insurers to undertake burdensome actions overseas, on the pain of heavy penalties imposed on their California corporate relatives, even if those actions are contrary to foreign criminal law.

The Ninth Circuit reasoned that the HVIRA is protected by the McCarran-Ferguson Act because the state law ostensibly relates to the California licensing process and "affects foreign commerce only indirectly." Pet. App. 45a. But, as shown above, the HVIRA has a direct effect on foreign commerce. Moreover, under the court of appeals' reasoning, *no* state law ever would be thought to have an extraterritorial effect because states may act directly only on entities within their jurisdiction. Such an approach would read all limits on extraterritorial legislation out of the Act — and out of the Commerce Clause.

III. THE HVIRA EXCEEDS DUE PROCESS LIMITS ON CALIFORNIA'S LEGISLATIVE JURISDICTION

A. Due Process Requires "Minimum Contacts" For State Legislative Jurisdiction.

The HVIRA cannot survive scrutiny under the Due Process Clause, which precludes California from applying its "substantive law to factual and legal situations with which it has little or

no contact." *McCluney* v. *Jos. Schlitz Brewing Co.*, 649 F.2d 578, 580 (8th Cir.), aff'd, 454 U.S. 1071 (1981). Accord, *e.g.*, *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 819-822 (1985); *Home Ins. Co.* v. *Dick*, 281 U.S. 397, 407-408 (1930). This Court's decisions on legislative jurisdiction "stand for the proposition that if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional." *Allstate Ins. Co.* v. *Hague*, 449 U.S. 302, 310-311 (1981) (plurality opinion).

The "minimum contacts" or "due process nexus analysis" inquires whether a party's "connections with a State are substantial enough to legitimate the State's exercise" of jurisdiction. *Quill Corp.* v. *North Dakota*. 504 U.S. 298, 312 (1992). Moreover, due process limits on state legislative jurisdiction carry special force in "the international context," where the sovereign interests of other nations are implicated. See *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 115 (1987) (plurality opinion) (jurisdictional limits require "[g]reat care and reserve" where "[t]he procedural and substantive policies of other *nations* * * * are affected").

In *Home Ins. Co.* v. *Dick*, this Court addressed the scope of state legislative jurisdiction over an insurance contract between a Mexican resident and a Mexican insurer covering the loss of property in Mexico. When a Texas assignee sued the Mexican insurer and its New York reinsurers in Texas, relying on a Texas statute invalidating any contractual limitations period of less than two years in order to avoid the contract's one year limitations period, the Court ruled that Texas lacked legislative jurisdiction over the contract (281 U.S. at 408):

> [N]othing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas. All acts relating to the making of the policy were done in Mexico. All [acts] in relation to the making of the contracts of reinsurance were done there or in New York. And, likewise, all things in regard to performance were to be done outside of Texas. * * * The fact that Dick's permanent residence was in Texas is without significance.

Subsequent decisions confirm that the Due Process Clause forbids a state to apply its law to transactions or parties having little or no connection to the state. In *Connecticut General Life Insurance Co.* v. *Johnson*, 303 U.S. 77 (1938), this Court invalidated California's attempt to tax a California-licensed insurer's receipt of premiums on reinsurance held by other California insurers. The reinsurance contracts at issue covered losses on life insurance policies issued to California residents, but they were executed (and the premiums were paid) in Connecticut. Observing that "California had no relationship to [the reinsurers] or to the reinsurance contracts" — because "[n]o act in the course of their formation, performance or discharge, took place there" — the Court held that "[t]he tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state." *Id.* at 81-82.

The Court held that the state statute in *Connecticut General* violated due process, even though California law did not purport to change the substantive terms of any foreign insurance contracts. 303 U.S. at 81-82. Rather, it was improper for the State to impose its law in an effort to regulate *any* aspect of contracts that had no significant nexus to the State. See also *State Bd. of Ins.* v. *Todd Shipyards Corp.*, 370 U.S. 451, 454-455 (1962) (reaffirming *Connecticut General* and holding that due process forbids a state from taxing insurance transactions that "take place entirely outside [the State]," even where "the property covered by the insurance is physically located in [the State]"); *Hartford Accident & Indem. Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143, 149 (1934) (invalidating application of a state statute to fidelity bonds executed in other states and holding that a state "cannot extend the effect[s] of its laws beyond its borders").

B. California Lacks The "Due Process Nexus" Required For The HVIRA.

California lacks sufficient contacts with the insurance transactions and parties subject to the HVIRA to sustain the State's legislative jurisdiction. California's primary basis for the assertion of jurisdiction must be the fact that the parties ostensibly subject to the HVIRA are insurance companies registered to do business in the State. But this reasoning elevates form over substance. As we explained above, the HVIRA's impact on domestic companies is simply a means to the end of compelling conduct by entities *outside* California: the entire purpose of the statute is to use the fortuity of a license in California as a lever to compel the disclosure of voluminous information on insurance policies issued in *Europe*, to *European* citizens, by *European* companies. No decision of this Court suggests that the requirements of due process may be circumvented through use of such a subterfuge.

The only other arguable "nexus" that California could possibly claim is the fact that — decades after the events in question — a small number of Holocaust survivors (or their heirs) moved to California. Cal. Ins. Code § 13801(d) ("At least 5,600 documented Holocaust survivors are living in California today."). But this Court repeatedly has held that a party's post-transaction change of residence does not justify a forum state's exercise of legislative jurisdiction over a foreign transaction. See *Shutts*, 472 U.S. at, 820 ("Even if a plaintiff evidences his desire for forum law by moving to the forum, we have generally accorded such a move little or no significance."); *Hague*, 449 U.S. at 311 ("[A] postoccurrence change of residence to the forum State — standing alone — [i]s insufficient to justify application of forum law").

In identical circumstances, the Eleventh Circuit in *Gerling Global Reinsurance Corp.* v. *Gallagher*, 267 F.3d 1228 (2001), applied due process principles to invalidate Florida's Holocaust Victims Insurance Act. The Florida statute, like the HVIRA,

imposed extensive reporting requirements on Florida affiliates of European insurers that issued policies in Europe during the Holocaust in order to create an insurance registry that would assist in the collection of Holocaust-era insurance proceeds through litigation. Faithfully applying this Court's precedents, the Eleventh Circuit held that the statute exceeded Florida's legislative jurisdiction (*id.* at 1238):

> The subject of the * * * Act is Holocaust-era insurance policies and the payment of claims still due under those policies. While there may be a connection between the State of Florida and that subject to the extent it relates directly to the activities of Florida insurers, there is virtually *no* connection between the State of Florida and that subject to the extent it concerns insurance transactions involving Plaintiffs' German affiliates that took place years ago in Germany, among German residents, under German law, relating to persons, property, and events in Germany.

This case is indistinguishable from *Gerling*. California, like Florida, lacks sufficient contacts with the transactions and parties subject to the HVIRA to sustain its jurisdiction.

C. The HVIRA Regulates Foreign Insurers And Foreign Insurance Transactions.

The Ninth Circuit declined to apply this Court's "legislative jurisdiction analysis" because the HVIRA "does nothing more than seek information from California licensed insurers. Therefore, the Commissioner need not prove that minimum contacts exist between California, Plaintiffs' foreign affiliates, and the Holocaust-era policies issued by them." Pet. App. 20a.

This argument depends on the erroneous assertion that the HVIRA does not "directly regulate[] foreign insurance companies." *Id.* at 12a. But as demonstrated above (at 36-38), the compelled production of huge amounts of confidential information from European archives in violation of foreign privacy laws is plainly regulation. There is no basis as a practical matter

for differentiating between "substantive" regulations and regulations that require "disclosure of information." In either event, California is seeking to impose its governmental power over transactions that have no relationship to the State. Thus, even if this Court were to accept the Ninth Circuit's characterization of the HVIRA as a mere "reporting" statute, that would not immunize the statute from the constitutional limits on California's legislative jurisdiction.

The Ninth Circuit also erred in holding that the HVIRA's reporting provisions "do not seek to regulate the substance of out-of-state transactions." Pet. App. 15a. As described above, the HVIRA redefines the "proceeds" of European insurance policies to exclude wartime or postwar currency devaluation. Cal. Ins. Code § 13802(c). This definition revises European insurance policies that were fully paid under governing foreign law, and insurers may now be subject to claims that they have failed to pay all the "proceeds" due under California's new definition. Thus, contrary to the Ninth Circuit's repeated assertions (*e.g.*, Pet. App. 11a-19a), the HVIRA *does* "substantively regulate" foreign insurance policies. Under *Dick* and this Court's subsequent decisions, the HVIRA is unconstitutional.

D. The HVIRA Is Not A Licensing Or Fitness Statute.

Both the State Insurance Commissioner (Br. in Opp., No. 02-733, at 20) and the Ninth Circuit (Pet. App. 20a, 44a), ultimately defend the HVIRA as a mere "licensing" statute designed to assess the fitness of California insurers that might not have "paid valid insurance claims." Pet. App. 44a. This revisionist account of the purpose of the HVIRA is flatly contradicted by the statute's text and legislative history.

On its face, the HVIRA states that disclosure "is necessary to protect the claims and interests of California residents * * * [and] to encourage the development of a resolution to these issues." Cal. Ins. Code § 13801(f); accord *id.* § 13801(d)-(e) (noting that the Act was passed "in order to ensure that closure on [Holocaust-era insurance] issue[s] is swiftly brought to

pass," and "to ensure the rapid resolution of these questions"). Nowhere does the statute mention licensing standards or the "fitness" or "financial condition" of California licensees.

The legislative history of the HVIRA confirms that the statute was enacted not to establish or enforce licensing standards but "to ensure that Holocaust victims or their heirs can take direct action on their own behalf with regard to insurance policies and claims." ER 994; ER 999 (the HVIRA's purpose is to "provide assistance to Holocaust victims and their families in collecting the proceeds of insurance policies in effect during World War II"); see pages 9-10, *supra*.

Other factors confirm that the HVIRA is not a licensing statute. For example, whereas information submitted to satisfy California's general insurance licensing statute, Cal. Ins. Code § 1215, *et seq.*, is not made public, information required by the HVIRA is placed into a registry for public use. *Id.* § 13803. If the purpose of the HVIRA were to assist California *regulators* in identifying mismanaged foreign affiliates, it is difficult to imagine what need there would be to "ensure public access" to such information (*ibid.*). State officials could simply use the data to decide whether to issue a license. Moreover, if the HVIRA were actually concerned with the fitness of insurers in the State, it would apply both to license applicants and to those that hold a license, and not merely — as it does (*id.* § 13804(a)) — to current license holders.

In addition, the propriety of foreign insurers' overseas claims-payment practices cannot meaningfully be analyzed without considering whether the insurers were legally obligated to pay policyholders under foreign law. The HVIRA, however, requires disclosure of the disposition of *all* proceeds of *all* Holocaust-era insurance policies and invites litigation in California without regard to the requirements of governing foreign law. Contrary to the Commissioner's arguments, this is nothing like asking whether a foreign affiliate has ever been found liable for fraud: the requested information provides no

way of knowing whether the claims *should have been paid* and, therefore, is of no help in determining whether the foreign insurer would itself be fit to sell policies in California.

Thus, there is no basis for the Ninth Circuit's concern that invalidating the HVIRA "would invalidate many existing reporting statutes." Pet. App. 20a. Statutes requiring banks and insurance companies to "disclose foreign activities and transactions engaged in by them and their parent and affiliate companies," *ibid.*, are directed at current practices bearing on the fitness of state licensees. By contrast, the HVIRA is directed solely at European insurance transactions concluded more than 55 years ago and takes no account of the lawfulness of those transactions under controlling foreign law. That subject has no reasonable nexus with California and is therefore beyond the State's jurisdiction.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, AMERICAN RE-INSURANCE COMPANY, ET AL.,

Petitioners,

v.

JOHN GARAMENDI, IN HIS CAPACITY AS COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

California's Holocaust Victim Insurance Relief Act ("HVIRA") requires California insurers to provide extensive information regarding every insurance policy issued in Europe between 1920 and 1945 by any insurer with which a California insurer now has a legal relationship. The district court enjoined enforcement of the HVIRA on three constitutional grounds: interference with the federal government's power over foreign affairs, due process, and the Foreign Commerce Clause. Over the objections of the U.S. government and affected foreign governments, and in direct conflict with *Gerling Global Reinsurance Corp. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001), the Ninth Circuit reversed and upheld the HVIRA in all respects.

The questions presented are:

1. Whether the HVIRA, which the U.S. government has called an "actual interference" with U.S. foreign policy, and which affected foreign governments have protested as inconsistent with international agreements, violates the foreign affairs doctrine of *Zschernig v. Miller*, 389 U.S. 429 (1968).

2. Whether the HVIRA, which attempts to regulate insurance transactions that occurred overseas between foreign parties more than half a century ago, exceeds California's legislative jurisdiction under the Due Process Clause.

3. Whether the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, insulates the HVIRA from review under the Foreign Commerce Clause.

LIST OF PARTIES AND CORPORATIONS

The petitioners are: American Insurance Association, American Re-Insurance Company, Winterthur International America Insurance Company, Winterthur International America Underwriters Insurance Company, General Casualty Company of Wisconsin, Regent Insurance Company, Southern Insurance Company, Unigard Indemnity Company, Unigard Insurance Company, Blue Ridge Insurance Company, and Assicurazioni Generali S.p.A. In addition, the respondents Gerling Global Reinsurance Corporation of America, Gerling Global Reinsurance Corporation-U.S. Branch, Gerling Global Life Reinsurance Company, Gerling Global Life Insurance Company, Gerling America Insurance Company, and Constitution Insurance Company (collectively, the "Gerling Companies") were parties to the proceedings below. The respondent, John Garamendi, is the Commissioner of Insurance for the State of California.

The Rule 29.6 statement for each of the respondent Gerling Companies is set forth in their petition for a writ of certiorari (Docket No. 02-733) at page iii.

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OPINIONS BELOW

The district court's initial opinion (per Shubb, D.J.) entering a preliminary injunction (Pet. App. 85a-113a) was not published. The court of appeals' opinion (per Graber, C.J.) rejecting the reasoning of the district court and remanding (Pet. App. 34a-60a) is published at 240 F.3d 739 (9th Cir. 2001). The district court's subsequent opinion (per Shubb, D.J.) granting a permanent injunction (Pet. App. 61a-84a) was published at 186 F. Supp. 2d 1099 (E.D. Ca. 2001). The court of appeals' subsequent opinion, as amended (per Graber, C.J.), reversing the district court (Pet. App. 1a-33a) is published at 296 F.3d 832 (9th Cir. 2002). The court of appeals' order denying rehearing and rehearing *en banc* is not otherwise published.

JURISDICTION

The court of appeals entered its judgment on July 15, 2002, and issued its amended opinion and order denying rehearing and rehearing *en banc* on September 9, 2002. Pet. App. 3a-4a. The petition for a writ of certiorari (*American Ins. Ass'n v. Low*, No. 02-722) was filed on November 7, 2002, and granted on January 10, 2003. The Gerling Companies[1] were parties to the court of appeals' opinions which are now under review and filed a companion petition for writ of certiorari on November 8, 2002 (*Gerling Global Reinsurance Corp. of America v. Low*, No. 02-733).[2]

1. Gerling Global Reinsurance Corp. of America, Gerling Global Reinsurance Corp. – U.S. Branch, Gerling Global Life Reinsurance Company, Gerling Global Life Insurance Company, Gerling America Insurance Company and Constitution Insurance Company.

2. Pursuant to Sup. Ct. R. 12.6, the Gerling Companies, as parties "to the proceeding in the judgment . . . sought to be reviewed," (Cont'd)

The Gerling Companies' petition has not been ruled on. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant text of the Due Process Clause, the Commerce Clause, the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 and the Holocaust Victim Insurance Relief Act (CAL. INS. CODE §§ 13800-13807) are reprinted in the appendix to the petition for a writ of certiorari at 114a-122a. The provisions of the "Knox Bill" (1999) Cal. A.B. 600 are reprinted in the Lodging filed with the Gerling Companies' petition for a writ of certiorari at L-136-L-141.

STATEMENT

This case arises out of a California insurance statute that demands disclosure of every insurance policy in effect in Europe during a 25 year period in the early part of the Twentieth Century. The central issues presented here relate to the limitations imposed by the U.S. Constitution on state regulatory power. First, whether Due Process and Commerce Clause considerations allow a state to mandate conduct by entities with no jurisdictional nexus to the state regarding transactions that occurred far beyond its borders. Second, whether the California statute violates the foreign affairs power exclusively entrusted to the federal government.

(Cont'd)
are "entitled to file documents in this Court" and are considered respondents. The Gerling Companies support the Petitioners in this action and file their brief in accordance with Petitioners' briefing schedule. *See* SUP. CT. R. 25.1.

In 1999, the State of California enacted the Holocaust Victim Insurance Relief Act, CAL. INS. CODE §§ 13800-13807 (the "HVIRA"), which, in part, requires insurers to compile and report detailed information in the possession of their European affiliates relating to European insurance policies for the purpose of aiding in the "resolution" of Holocaust-era claims pursuant to California-imposed standards. CAL. INS. CODE § 13801(e)-(f). The HVIRA requires European insurers to amass voluminous information, the disclosure of which is prohibited by European law, and provide it to their California affiliates, who in turn must provide it to the California Insurance Commissioner (the "Commissioner") for inclusion in a public registry. The HVIRA mandates automatic license suspension of California insurers for their inability to provide information in the hands of distant European affiliates.

Adopting the Commissioner's unsupported, after the fact recharacterization of the HVIRA as a "fitness" or "licensing" statute of California insurers, the Ninth Circuit upheld the constitutionality of the HVIRA. In doing so, the Ninth Circuit ignored the district court's findings that the Gerling Companies lack possession, custody or control over the European insurance records demanded. The Ninth Circuit also ignored the conclusive determination of the Federal Republic of Germany that its laws prohibit the wholesale disclosure of private insurance information for public dissemination as required by the HVIRA.

The Ninth Circuit brushed aside the Gerling Companies' objections to the impossible demands imposed on them by the HVIRA with the suggestion that the "California insurer's employees could travel overseas to examine the documents themselves." Pet. App. 13a. Alternatively, the Ninth Circuit

suggested that California insurers simply disaffiliate themselves from their European relatives so as to shed themselves of any reporting requirements. Pet. App. 13a.

The HVIRA empowers the Commissioner to penalize domestic insurers as a means of coercing foreign insurers to bend to California's will. As a representative for the Commissioner has unequivocally stated, "Maybe the [California] subsidiary has not been involved, but the [European] parent company has, and the only way to send a clear message to the parent company is to hit the arm of the company that can be hurt."[3] The HVIRA's attempted expansion of the Commissioner's powers far beyond the borders of the state is simply incompatible with constitutional limitations on state power.

A. California's Regulation Of European Insurance Policies

On October 8, 1999, California Governor Gray Davis signed into law Assembly Bill No. 600, the "Knox Bill." Pet. App. 115a-122a. The Knox Bill represents California's attempt to use its leverage over local insurers to force European insurers, over whom California has no jurisdiction, to produce information concerning millions of European insurance policies. *See* CAL. INS. CODE § 13801(e). California undertook this mission to achieve a clearly defined goal – to aid in "the rapid resolution" of Holocaust-era insurance claims arising out of policies issued in Europe. Pet. App. 119a.

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3. Amanda Levin, *California Acts Against Four Firms Over Holocaust Claims*, National Underwriter – Life & Health, June 28, 1999.

To that end, the Knox Bill extended the statute of limitations for claims arising under such European policies until December 31, 2010, nullified forum selection provisions contained in European policies, vested California state courts with jurisdiction over related claims, and provided that California-licensed companies could be held directly liable for claims arising out of policies issued by "related" European insurers. Pet. App. 115a-118a. The Knox Bill also purported to modify the value of pre-1945 European policies by eliminating the effects of post-war currency devaluation. Pet. App. 120a.

The Knox Bill introduced an expansively worded definition of the term "related company" to throw the broadest possible net over the European insurance industry: "any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer." Pet. App. 120a. CAL. INS. CODE § 13802. This definition is not limited to companies within the same "corporate family," but extends to entities with little more than contractual or other legal relationships with the California company. *Id.*

The reporting portion of the Knox Bill is known as the HVIRA and was codified at CAL. INS. CODE §§ 13800-13807. The remaining portions of the Knox Bill were codified at CAL. CODE OF CIV. PRO. § 354.5. Pet. App. 117a-118a. The HVIRA requires all California-licensed insurers to provide the Commissioner with information regarding every European insurance policy issued by it or a "related company" in effect between 1920 and 1945. CAL. INS. CODE § 13804(a). The information required includes the number of such European policies; the holder, beneficiary and current status of those policies; and the city of origin, domicile or address for each policy holder listed in the European policies. *Id.*

The HVIRA further requires the *California* insurer to certify whether the *European* insurer has paid the policy proceeds. CAL. INS. CODE § 13804(b).

In the event that the California licensee fails to fully comply with the HVIRA, "The commissioner shall suspend the certificate of authority to conduct insurance business in the state . . ." CAL. INS. CODE § 13806. This penalty is mandatory. Neither lack of control over the information sought nor disclosure prohibitions embodied in European privacy laws is an acceptable defense. ER 1019-20, 1030, 3179.[4] Moreover, the HVIRA does not expressly provide for an administrative hearing prior to license suspension. CAL. INS. CODE §§ 13800-13807.

1. The Legislative History of the HVIRA

The HVIRA's legislative history amply demonstrates that its sole purpose is to compel European insurers to pay European insurance claims. ER 1204, 2695. Throughout its two-year legislative history, the HVIRA's supporters repeatedly expressed the desire to force European insurers to "be held accountable" and to "open their books." ER 2492, 2664, 2671, 2676, 2687, 2695; *see also* ER 1204, 2425. The legislative history highlights a fact which is evident from the language of the statute itself: the HVIRA represents an attempt to effect the conduct of, and thereby regulate, European insurance companies.

4. "ER" indicates references to the Excerpt of Record in the Ninth Circuit. "SER" indicates references to the Supplemental Excerpt of Record.

a. AB 1715

The HVIRA was initially introduced by California Assemblyman Wally Knox on January 28, 1998 as AB 1715. ER 2429. The bill (1) required the Commissioner to establish a central registry of European insurance information; (2) demanded that insurers affiliated with companies that issued policies in Europe between 1930 and 1945 disclose records of their European affiliates; (3) imposed a $5,000 fine for non-compliance or a civil penalty not to exceed $10,000; and (4) instructed the Commissioner to adopt rules to implement the statute. *See* AB 1715, State Assembly, 1997-98 Reg. Sess. (Ca. Jan. 28, 1998).

Within days of its introduction, the California Insurance Department (the "Department") requested that Assemblyman Knox include two modifications to AB 1715. ER 2490. To maintain pressure on European insurers, the Department specifically requested the inclusion of an urgency clause and a provision authorizing it to suspend non-compliant companies' certificates of authority to conduct business in the state. ER 2490.

The Department's recommendations, as well as other changes penalizing California companies, were incorporated in the bill. *See* AB 1715, State Assembly, 1997-98 Reg. Sess. (Ca. Mar. 17, 1998). When AB 1715 was amended on March 17, 1998, it maintained its requirement that the Commissioner establish and maintain a public registry of European insurance information. *See id.* at § 13803. As amended, AB 1715 imposed upon California-licensed insurers reporting obligations which were in all material respects identical to those ultimately contained in the HVIRA. *See id.* at § 13804; ER 2659-60; Pet. App. 120a-121a.

The revised reporting provisions, the license suspension mandate, and the legislative findings incorporated into AB 1715 further illuminated its purpose – to compel European insurers to pay European insurance claims on California's terms. ER 2492, 2513. The bill also redefined how European policy "proceeds" would be calculated. AB 1715, State Assembly, 1997-98 Reg. Sess. (Ca. Mar. 17, 1998). Assemblyman Knox stated that AB 1715 was intended to "provide assistance to Holocaust victims and their families in collecting the proceeds of insurance policies in effect during World War II, which some insurers have avoided paying." ER 2427. Assemblyman Knox repeatedly echoed these sentiments in statements to the Senate Committee on Insurance, the Senate, and the Assembly Committee on Insurance. ER 2442, 2447-49, 2495, 2487-88. Further, the official Assembly Republican Bill Analysis stated that the bill's purpose was to "provide assistance for Holocaust Victims and their descendants in recovery of unpaid or wrongfully paid claims." ER 2412, 2415. All parties involved acknowledged that the legislation was focused on insurance claims arising under policies issued by European companies to European residents.

During 1998, the Department repeatedly voiced its unequivocal support for AB 1715. ER 2459-60, 2490. The Department viewed the legislation "as an important vehicle for empowering the CDI [California Department of Insurance] to ensure full payment of claims to Holocaust survivors and descendants." ER 2459-60. This position is reiterated throughout AB 1715's legislative history. ER 2427, 2433.

Nowhere in the extensive legislative history is there any mention of a purpose other than compelling European

insurers to pay Holocaust-era insurance claims. The legislative history is devoid of any suggestion that AB 1715 was deemed necessary to determine whether insurers who were already licensed by the Department were, in fact, fit to do business in the state.

AB 1715 was vetoed by Governor Pete Wilson on September 28, 1998. ER 2693-96. Governor Wilson stated that he "would prefer to see the time and resources of the insurers spent in payment of claims by Holocaust victim policy holders, survivors or heirs, than expended in compiling a massive database that seems likely to produce far less relevant and useful information." *Id.*

b. AB 600 – The Knox Bill

On February 19, 1999, following a change in administrations, Assemblyman Knox reintroduced AB 1715 as AB 600 (the "Knox Bill"). ER 2597-606. The Knox Bill was materially identical to the legislation vetoed by Governor Wilson. ER 2663, 2670, 2675, 2680, 2682-686, 2699. Like AB 1715, the Knox Bill introduced an amended California Code of Civil Procedure Section 354.5 as well as the HVIRA (CAL. INS. CODE §§ 13800-13807). ER 2599-606, 1201-1205, 2439; *see also* AB 600, State Assembly, 1999-2000 Reg. Sess. (Ca. Feb. 19, 1999).

The purpose behind AB 600 and the sentiments supporting it mirrored those advanced in AB 1715's legislative history. Assemblyman Knox introduced "AB 600 in order to ensure that Holocaust victims or their heirs can take direct action on their own behalf with regard to family-owned insurance policies." ER 2663, 2670, 2675, 2687, 2695. The Department supported the Knox Bill because of its view

that European "insurance companies . . . should be held accountable, open their books and pay legitimate claims." ER 2664, 2671, 2676, 2687, 2695.

The Assembly Committee on Appropriations bill analysis states that "[a]ccording to the author, European insurers refused to pay claims to Holocaust survivors and their families, or failed to follow up on claims they had reason to believe were due. Some of these insurers have affiliates operating in California." ER 2667. Like its predecessor, the Knox Bill represented a thinly veiled attempt to reach European insurers who otherwise would not be subject to California's jurisdiction.

The legislative history of the Knox Bill is also devoid of any suggestion that "licensing" or "fitness" of California insurers were considerations motivating its introduction. In fact, the legislation (and resulting HVIRA) applied only to insurers with existing California licenses – companies which the Department had presumably already found fit to do business in the state. CAL. INS. CODE § 13804(a).

Like the California Legislature and the Department, Governor Davis saw AB 600 as a vehicle to compel European insurers to pay on Holocaust-era policies. Governor Davis signed AB 600 into law on October 8, 1999. Two days later, the Governor issued a press release announcing that he had "signed legislation . . . providing assistance to Holocaust victims and their survivors in recovering just compensation from Holocaust era insurance policies." Press Release, Office of the Governor-State of California, Governor Davis Signs Bill Requiring Holocaust Insurance Registry (October 10, 1999) (on file with Author at L99:214), *available at* http://www.governor.ca.gov.

2. California's Efforts to Directly Investigate European Insurers

The HVIRA was the culmination of several years of efforts by the Commissioner to directly investigate European insurers. In February 1998, during testimony before the United States House Banking and Financial Services Committee, then Commissioner Chuck Quackenbush stated that he was "deeply committed . . . to resolving all outstanding claims and holding all insurance companies that sold policies to Holocaust victims in Europe . . . accountable for their actions and their failure to act in good faith over the last 50 years." SER 608. Commissioner Quackenbush further testified that:

> [t]he challenge for American insurance regulators now is to ensure that the records of the insurance policies housed in archives throughout Europe – in Italy, Germany, and Switzerland, France and Austria in particular – are secured from tampering. Ensuring the integrity of these records and combing through them to identify which claims have yet to be paid and identifying surviving beneficiaries presents an enormous challenge that we cannot fail to undertake.

SER 610.

In November of 1999, the Commissioner announced that he planned to unveil an aggressive legislative package to put additional pressure on European companies.[5] He further

5. Press Release, Cal. Ins. Department, Insurance Commissioner Quackenbush to Subpoena Companies to December Hearings to (Cont'd)

stated that he "currently [had the] Department reviewing all options to pursue regulations to affect economic sanctions on companies that continue to stand on the sidelines and fail to enter into negotiations to resolve unpaid Holocaust-era insurance policies." *Id.*

3. The Commissioner's Efforts to Investigate the German Affiliates of the Gerling Companies

The Gerling Companies are California-licensed insurers and/or reinsurers based in the United States or Canada that, with one exception, were formed years after the Second World War. ER 642-670. None of the Gerling Companies ever issued any insurance policy that was in force anywhere in Europe between 1920 and 1945. ER 643, 648, 653, 658, 663, 668. Similarly, none of the Gerling Companies are in possession, custody or control of any records pertaining to insurance policies that were in force in Europe at any time between 1920 and 1945. *Id.* Pet. App. 65a. The Gerling Companies are, however, indirectly related (within the meaning of the HVIRA) to two German insurers that issued policies in Europe between 1920 and 1945: Gerling-Konzern Allgemeine Versicherungs-AG ("GKA") and Gerling-Konzern Lebensversicherungs-AG ("GKL"). ER 643, 648, 653, 658, 663, 668. As the district court found, GKA and GKL are not subject to personal jurisdiction in California. Pet. App. 65a.

In 1999, the Commissioner initiated efforts to directly investigate the Gerling Companies' German affiliates. Towards that end, in May 1999, the Commissioner appointed

(Cont'd)
Investigate Efforts to Resolve Unpaid Holocaust-Era Insurance Issues (Nov. 9, 1999), *available at* www.insurance.ca.gov/PRS/PRS1999/Pr171-99.htm.

Special Deputy Insurance Commissioner Karl Rubinstein to "investigate" the Gerling Companies with respect to Holocaust-era claims. SER 684-685. Deputy Commissioner Rubinstein immediately notified the German affiliates of his appointment and of his "right" to "free access" to relevant German insurance records. SER 687.

Deputy Commissioner Rubinstein then commenced an investigation into the claims-paying practices of GKA and GKL and issued written interrogatories to both entities and their German parent. SER 1072-1089. Notwithstanding the fact that none of these companies conduct any business in California, he demanded specific information regarding (1) the number of policies the German companies issued in Europe during the period 1920-45; (2) which premises of these companies were destroyed or damaged during the war; (3) their European reinsurance agreements; and (4) what actions these entities took to identify claimants and/or beneficiaries for policies issued between 1920 and 1945. Furthermore, the Department requested a list (with accompanying records) of all records relative to policies written in Europe between 1920 through 1945 and details regarding the claims-paying practices of the German companies.[6] SER 1072-1089.

In November 1999, respondent Gerling America Insurance Company received a subpoena requiring it, along with certain other insurers, to appear at a hearing before the Commissioner in Los Angeles on December 1, 1999. SER 268-269. During the hearing, the Department conceded that it was not really interested in the subpoenaed entity and requested direct access to the related German companies.

6. At that time, the Department also requested that the German companies make available a representative for a telephone deposition. This deposition took place shortly thereafter in 1999.

ER 1113-1115. In this regard, Leslie Tick, Senior Staff Counsel for the Department, unequivocally stated that "the Knox Bill goes clearly beyond the California licensed company." ER 1111.

B. The HVIRA's Conflict With German Law

In various *amicus* filings in this litigation, the Federal Republic of Germany has characterized the HVIRA as an "affront" to its sovereignty. *See* Brief of the Federal Republic of Germany, *Amicus Curiae* in Support of Petitioners (dated December 12, 2002) at p. 2; ER 844. This view is premised on a litany of complaints which Germany has made as respects the ways in which the HVIRA interferes with the operation of existing German law. In Germany's view, the HVIRA (1) interferes with Germany's regulation of insurers operating within its borders; (2) mandates that German insurers violate German data protection laws; (3) attempts to supplant 50 years of German reparations efforts with respect to Holocaust-era claims; (4) conflicts with post-war German currency reform; and (5) interferes with the operation of various international agreements which Germany has reached with a number of nations including the United States. *See, e.g.*, Brief for the Federal Republic of Germany, *Amicus Curiae* in support of Petitioners (dated December 12, 2002); ER 843-855, 1279-1289; SER 1243-1250, 1425-1432.

1. German Data Protection Laws

In the aftermath of World War II, the European community recognized the importance of ensuring certain fundamental rights, including a right to personal privacy.[7]

7. *See, e.g.*, Rainer Arnold, *A Fundamental Rights Charter for the European Union*, 15 Tul. Eur. & Civ. L.F. 43,45 (2000-01); Marsha Cope Huie, et al., *The Right to Privacy in Personal Data:* (Cont'd)

In Germany, the right of "informational self-determination," *i.e.*, the right to determine which data can be used by whom and for what purpose and under what conditions, is embodied in the German Constitution and is recognized as a fundamental human right. ER 681. In accordance with the German constitutional recognition of the fundamental right to "informational self-determination," German companies are subject to the requirements of the German Data Protection Act (*Bundesdatenschutzgesetz* ("BDSG")). ER 682, 846. The BDSG addresses and secures this fundamental right as contained in the Constitution (*Grundgesetz*) of the Federal Republic of Germany. ER 687.

In 2001, the BDSG was amended due to the introduction of the European Data Protection Directive of 1995. The result has been an increase in the protection of particularly sensitive data, such as data concerning racial or ethnic origin, religious or political beliefs, health, sexual habits or union membership. ER 2859. The European Union Directive, which controls the dissemination of personal information in Europe (ER 1488-1542), is intended to respond to the need to safeguard the fundamental rights of individuals. ER 2859.

Under the BDSG, decisions as to the use of personal data must be made by the individuals to whom the data relate. ER 681. The entities holding the personal data (in this case, German insurers) may be subject to civil and criminal penalties as a result of their unauthorized disclosure of such data to third-parties. SER 1248. In a series of *amicus curiae* briefs in this litigation, the Federal Republic of Germany

(Cont'd)
The EU Prods the U.S. and Controversy Continues, 9 Tulsa J. Comp. & Int'l L. 391, 441, 442, 456-57 (2002).

has echoed that conclusion. *See* Brief for the Federal Republic of Germany, *Amicus Curiae* in Support of Petitioners (dated December 12, 2002) at pp. 4-5; ER 846; SER 1248; Brief for the Federal Republic of Germany, *Amicus Curiae* Supporting Affirmance of Summary Judgment (dated March 15, 2002) at p. 6; Brief for the Federal Republic of Germany, *Amicus Curiae* in Support of Rehearing and Rehearing *en Banc* (dated August 5, 2002) at pp. 9-10. The German authorities charged with enforcement of the BDSG have already concluded on *two* occasions that compliance with the HVIRA would violate German law and would subject German insurers to criminal and civil penalties. ER 1182, 3131.

The aspects of the HVIRA that appear particularly offensive from a German privacy law perspective are (1) the requirement that German insurers disclose information regarding *all* their insureds (not limited to deceased individuals or to Holocaust victims); and (2) the inclusion of this information in a massive public registry in California. *See* CAL. INS. CODE §§ 13803, 13804(a).

On May 16, 2000, the District Government of Cologne, Germany, concluded "that pursuant to § 28, paragraph 2, No. 1b BDSG, the transmission of data in the form of lists pertaining to all policyholders from 1920-1945 . . . is not permissible." ER 1182. Following the 2001 amendments to the BDSG, the Ministry of the Interior of North Rhine-Westphalia (Nordhein-Westfalen) also determined that "there still appears to be no legal basis that permits the transfer of all personal insurance data for the policies from the period 1920-1945. The substantive requirements of Section 28 BDSG for the transfer of data . . . continues to be limited to [Holocaust victims]." ER 3131. The Federal Republic of Germany has agreed with the foregoing opinions

and stated that "these are correct conclusions under German law." *See* Brief for the Federal Republic of Germany, *Amicus Curiae* in Support of Petitioners (dated December 12, 2002) at pp. 4-5.

Privacy laws such as the BDSG are commonplace in the United States as well. In fact, California has similar privacy requirements for insurance policies issued there. *See* CAL. INS. CODE § 791.13; *see also* 15 U.S.C. § 6802(a). Nevertheless, the HVIRA demands that German companies violate their own nation's laws or have their distant California affiliates stripped of their licenses.

2. U.S. Foreign Policy Initiatives

On July 17, 2000, the United States and Germany entered into an Executive Agreement (the "Executive Agreement") creating the Foundation "Remembrance, Responsibility and the Future" (the "Foundation").[8] The Executive Agreement has been described by former Deputy Secretary of Treasury Stuart Eizenstat, the principal negotiator for the United States, as "the last great compensation related negotiation arising out of World War II."[9] The Executive Agreement recognizes "that for the last 55 years the [United States and the Federal Republic of Germany] have sought to work to address the consequences of the National Socialist era and World War II" and further recognizes that the "[Executive]

8. www.state.gov/www/regions/eur/holocaust/000717_agreement.html. *See* Pet. App. 153a-157a.

9. White House Press Briefing by Stuart Eizenstat on Nazi-Era Forced and Slave Labor Agreement, U.S. Newswire, Dec. 15, 1999. *See* www.state.gov/www/policy_remarks/1999/991215_eizenstat_slavelbr.html. SER 940-47.

Agreement and the establishment of the Foundation represent a fulfillment of these [post-war] efforts." Pet. App. 155a.

a. Post-War Treaties and Other Agreements

The 55 years of United States foreign policy efforts referred to in the Executive Agreement date back to the Potsdam Agreement which was entered into immediately after the end of the war. "This agreement memorialized the dual policy determinations of the Allied governments that reparations should be extracted from Germany to compensate victims to the greatest extent possible . . ." *Frumkin v. JA Jones, Inc.*, 129 F. Supp. 2d 370, 376 (D.N.J. 2001); *see also Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 448 (D.N.J. 1999). Reparation claims were to be satisfied in the "form of machines, other industrial equipment and German external assets rather than in monetary payments." *Iwanowa*, 67 F. Supp. 2d at 448; *see also Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 265 (D.N.J. 1999).

The United States and other allied nations met in Paris in 1946 to develop a more detailed plan regarding the method in which they would distribute reparations between those nations as to which no decision had been reached at the Potsdam Conference. *Iwanowa*, 67 F. Supp. 2d at 448-49. Negotiations produced the Agreement on Reparation from Germany, Establishment of Inter-Allied Reparation Agency and Restitution of Monetary Gold, Jan. 14, 1946, 61 Stat. 3157, T.I.A.S. 1655 (the "Paris Agreement"). The intent of the Paris Agreement was "to obtain an equitable distribution among [the signatories] of the total assets which . . . are or may be declared available as reparation from Germany." *Burger-Fischer*, 65 F. Supp. 2d at 265. Ultimately it was

decided that "[t]he private industrial base of Germany would be dismantled and proportionally distributed to the Allied nations, in satisfaction of their claims, and the claims of their nationals." *Frumkin*, 129 F. Supp. 2d at 376.

The beginning of the Cold War caused the Western Allies, including the United States, to "cease their dispersal of the German industrial base, and balance the extraction of reparations with the restoration of a healthy German economy." *Frumkin*, 129 F. Supp. 2d at 376. This was reflected in the Convention on the Settlement of Matters Arising out of the War and the Occupation, signed at Bonn on May 26, 1952, as amended by Schedule 4 to the Protocol on the Termination of the Occupation Regime, signed at Paris on October 23, 1954, 332 U.H.T.S. 219 (the "Transition Agreement").

Under the Transition Agreement, responsibility to compensate victims of Nazi oppression was shifted to the Federal Republic of Germany. In this regard, Germany assumed:

> the obligation to implement fully and expeditiously and by every means in its power, the legislation referred to in Article I of [the chapter entitled Internal Transition] and the programs for restitution and reallocation thereunder provided. The Federal Republic shall entrust a Federal Agency with ensuring the fulfillment of the obligation undertaken in this Article, paying due regard to the provisions of the Basic Law [the German Constitution].

Transition Agreement Ch. 2, Art. 2. Further, Germany recognized its moral obligation to assure adequate compensation to victims of the Nazi Regime. The Transition Agreement provided as follows:

> The Federal Republic acknowledges the obligation to assure in accordance with the provisions of paragraphs 2 and 3 of this Chapter adequate compensation to persons persecuted for their political convictions, race, faith or ideology, who thereby have suffered damage to life, limb, health, liberty, property, their possessions or economic prospects (excluding identifiable property subject to restitution). Furthermore, persons persecuted by reason of human nationality, in disregard of human rights, who are now political refugees and no longer enjoy the protection of their former home country shall receive adequate compensation where permanent injury has been inflicted on their health.

Transition Agreement, Ch. 4. Consistent with Germany's recognition of its moral obligation, the Transition Agreement was intended to compensate Nazi victims through legislation enacted in Germany and adjudicated by German courts as well as through state-to-state agreements. *Burger-Fischer*, 65 F. Supp. 2d at 268.

b. German Reparations Legislation

Following the Transition Agreement, Germany enacted a comprehensive compensation law entitled the *Bundesentschädigungsgesetz* ("BEG") (*i.e.*, the Federal Compensation Law) in 1953 to provide for the reimbursement

of assets which had been seized by the Nazis. SER 55. This statute expressly provided compensation for loss of insurance and other assets. Under the BEG, and in accordance with its treaty obligations with the United States, the Federal Republic of Germany *assumed the obligation* to compensate victims of Nazi oppression as the sole and exclusive remedy for such claims. ER 847; *see also* SER 466-94, 1438.

German law *precludes direct claims against German insurers* for insurance proceeds that were subject to Nazi seizure. SER 466-94, 1438. In a 1953 decision, the Supreme Court of the Federal Republic of Germany held that claims for insurance proceeds appropriated by the Nazi government could not be asserted against the insurers who issued the policies. Instead, such claims must be asserted directly against the Federal Republic of Germany, as legal successor to the Nazi government. SER 464-94. According to the German Supreme Court, "*any* claims in favor of the policy holder that result from the unjust nature of the expropriation and confiscation of the insurance claim are to be regulated under the laws governing restitution and compensation to victims of persecution by the National Socialist regime." SER 465. (Emphasis added).

The processing of compensation and reparations claims has been ongoing virtually continuously since the enactment of the BEG. To date, the Federal Republic of Germany has paid more than 100 billion *Deutschmark* (nearly $50 billion) in compensation to victims of Nazi oppression. *See* Brief for the Federal Republic of Germany, *Amicus Curiae* in Support of Petitioners (dated Dec. 12, 2002) at p. 2. This figure includes reimbursement of insurance assets seized by the Nazis.

c. Additional International Agreements

During the nearly 60-year period since the end of the Second World War, the United States, Germany and other nations entered into various other agreements which address the issue of Holocaust reparations. For example, on September 10, 1952, Germany entered into the Luxembourg Agreement with the State of Israel. This agreement was intended to assist in the resettling of 500,000 destitute Jewish refugees displaced from Germany and former German controlled areas. Additionally, the United States, France, Great Britain, other Allied nations and the Federal Republic of Germany entered into the Agreement on German External Debts, February 27, 1953, 4 U.S.T. 444. This Agreement was intended to stabilize the German economy.

In the 1950s and 1960s, Germany entered into 12 treaties with western European countries. Pursuant to those treaties, Germany provided funds to those countries for distribution to their nationals who had been victims of the Nazis. Payments under these treaties amounted to DM 977 million. *Burger-Fischer*, 65 F. Supp. 2d at 270.

Germany also entered into agreements: (1) for payment of DM 200 million to the Jewish Claims Conference for the benefit of Jewish victims still living in Eastern Europe; (2) to enable the Red Cross to distribute DM 80 million for victims of Nazi oppression living in southeastern European countries; (3) to create a DM 1.6 billion fund for the benefit of Jewish victims who had been unable to apply for compensation because they were living in Eastern Europe and emigrated to the West after the expiration of claim deadlines; (4) in 1992 with the United States on the Settlement of Certain Property Claims of United States

citizens arising out of confiscation of assets by Nazis and Communist authorities within the Territory of former East Germany; and (5) in 1996 a Second Supplemental Social Security Agreement with the United States providing for payment of German social security benefits to Jews from Eastern Europe with a German cultural background who settled in the United States after fleeing their Nazi occupied homelands. *Burger-Fischer*, 65 F. Supp. 2d at 271.

In 1990, Germany, the United States, the United Kingdom, France and the U.S.S.R. entered into the "2+4 Treaty." *Iwanowa*, 67 F. Supp. 2d at 454. This treaty, which unified West and East Germany, terminated the occupying Allied powers' rights and responsibilities over Germany. *Iwanowa*, 67 F. Supp. 2d at 454. "In accordance with the Transition Agreement, this treaty, a peace treaty between a unified Germany and its former adversaries, finally settled the problems of reparations." *Iwanowa*, 67 F. Supp. 2d at 454 (citing Transition Agreement at Ch. 6, Art. 1). "German courts have held that the signing of the Two-Plus-Four Treaty constitutes the 'final settlement of the problem of [World War II] reparations'..." *Iwanowa*, 67 F. Supp. 2d at 455.

d. The German Foundation

The Executive Agreement entered into by the United States and Germany on July 17, 2000, represented the culmination of these reparation efforts. The Executive Agreement is intended to provide a mechanism for "German companies" (as defined in the Executive Agreement) "to respond to the moral responsibility of German business arising from the use of forced laborers and from damage to property caused by persecution, and from all wrongs suffered

during the National Socialist era and World War II." Pet. App. 153a. It reflects the principle that "German business . . . should not be asked to contribute again [or twice] . . . for any wrongs asserted against German companies arising from the National Socialist era and World War II." Pet. App. 154a. The Gerling Companies and their German affiliates are all "German companies" as that term is defined in the Executive Agreement. Lodg., *infra*, L-44.

On August 12, 2000, the German *Bundestag* established the Foundation as a sovereign instrumentality of the Federal Republic of Germany. ER 1382-84. The German government and German companies have funded the Foundation in an amount totaling DM 10 billion. SER 1427-28.

With respect to insurance claims, the Executive Agreement is intended to secure a measure of compensation to Holocaust victims at the earliest possible date in accordance with the claims procedures established by the International Commission on Holocaust-era Insurance Claims ("ICHEIC"). SER 1451. ICHEIC was established in October 1998 to investigate and resolve Holocaust-era insurance claims. The Commissioner is a founding member of ICHEIC. On October 16, 2002, ICHEIC, the German Foundation and the German Insurance Association reached an agreement regarding claims handling procedures and the publication of pertinent European insurance records (in a manner satisfying the requirements of German data protection laws). Lodg., *infra*, L-70-L-80.

SUMMARY OF ARGUMENT

In upholding the HVIRA, the Ninth Circuit has ignored constitutional restrictions imposed upon states by the Due

Process Clause and Commerce Clause. The Ninth Circuit has also paved the way for all 50 states to engage in their own foreign policy initiatives in blatant disregard of the efforts of the federal government.

The record in this matter is clear: the Gerling Companies do not have possession, custody or control over the European insurance information demanded by the HVIRA. Moreover, the German affiliates of the Gerling Companies would face civil and criminal penalties for disclosing this personal insurance information. Notwithstanding their inability to comply, the HVIRA mandates the suspension of the Gerling Companies' California licenses for their failure to produce the information sought.

California's regulation of foreign insurers and foreign transactions through the HVIRA exceeds its legislative jurisdiction under the Due Process Clause. On its face, the HVIRA solely seeks information on transactions that occurred outside the State of California at least 60 years ago – transactions with which California has absolutely no nexus. European companies are required to turn over this information to California in violation of their own laws. To force compliance by European companies, the HVIRA directs the Commissioner to suspend the licenses of their California affiliates irrespective of whether those California insurers ever issued Holocaust-era polices. The nominally regulated California companies merely serve as the conduit for the Commissioner to investigate and regulate insurers over which the State has no jurisdiction.

Similarly, the HVIRA violates Commerce Clause restrictions because of its extraterritorial application and effect. The HVIRA requires European insurers who are not

jurisdictionally present in the United States to take affirmative acts in violation of their own laws. In its application, the HVIRA requires nothing from the local insurers (aside from the sacrifice of their California licenses). In upholding the statute, the Ninth Circuit simply ignored the HVIRA's intent and "practical effect" to control conduct far beyond the borders of the state.

Finally, the HVIRA ignores over half a century of foreign policy initiatives between the United States and the Federal Republic of Germany addressing reparations arising from the Nazi era. The HVIRA conflicts with German data protection laws and internal German reparations laws that were enacted in accordance with international treaty obligations. As such, the HVIRA impermissibly intrudes upon the federal government's foreign affairs power.

ARGUMENT

I. THE HVIRA EXCEEDS CALIFORNIA'S LEGISLATIVE JURISDICTION UNDER THE DUE PROCESS CLAUSE

A. A State Must Have "Minimum Contacts" With A Regulated Subject In Order To Exercise Legislative Jurisdiction.

California's regulation of foreign insurers and foreign transactions through the HVIRA exceeds its legislative jurisdiction under the Due Process Clause. *See Asahi Metal Indus. Co. v. Superior Court of Cal.* 480 U.S. 102, 113 (1987). Legislative jurisdiction refers to both "the lawmaking power of a state" and "the power of a state to apply its laws to any given set of facts." *Adventure Communications, Inc. v.*

Kentucky Registry of Election Fin., 191 F.3d 429, 435 (4th Cir. 1999) (quoting *McCluney v. Jos. Schlitz Brewing Co.*, 649 F.2d 578, 581 n.3 (8th Cir.), *aff'd*, 454 U.S. 1071 (1981)).

The Due Process Clause requires that "there [is] at least some minimal contact between a State and the regulated subject before it can . . . exercise legislative jurisdiction." *Gallagher*, 267 F.3d at 1235 (quoting *American Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County*, 221 F.3d 1211, 1216 (11th Cir. 2000)); accord *Home Ins. Co. v. Dick*, 281 U.S. 397, 407-08 (1930). The "minimum contacts" or "substantial nexus" analysis "requires that we ask whether an individual's connection with a State are substantial enough to legitimate the state's exercise of power over him." *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992). The Court must also focus on the state's interest in the transaction it seeks to regulate. *Id.* at 306; *see also Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310 (1981). It is inconsistent with requirements of due process for a state to "regulate and control activities wholly beyond its boundaries." *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 70 (1954).

B. The Statutory Background And Legislative History Confirm That The HVIRA Regulates Foreign Insurers And Foreign Transactions

From its introduction in 1998 as AB 1715, through its enactment and initial enforcement in late 1999 and early 2000, the HVIRA had a single articulated purpose: to compel European insurers to provide information concerning millions of insurance policies sold in Europe to facilitate payment of claims under California-imposed standards. While nominally

directed at California-licensed companies, the HVIRA exclusively seeks information regarding European policies sold by European insurers. CAL. INS. CODE. §§ 13801, 13804. Under the HVIRA, the California licensees simply act as the Commissioner's doorway to regulate insurance throughout the world.

The intended extraterritorial reach of the HVIRA is perhaps most clearly reflected in a March 8, 2000, letter which the California State Treasurer wrote directly to a number of European insurers, including a German affiliate of the Gerling Companies, demanding their compliance with the HVIRA. In this letter, California directly threatened the German company with "protracted litigation" in the event that it failed to comply with the HVIRA. SER 901-902.

It was only after the initiation of this action that the Commissioner reinvented the HVIRA as a "fitness" or "licensing" statute of California insurers. The language of the statute does not support the Commissioner's new characterization. On its face, the HVIRA only compels production of information regarding insurance policies sold "to persons in Europe, which were in effect between 1920 and 1945." CAL. INS. CODE § 13804(a). The HVIRA does not request any information concerning policies sold in the United States, much less California.

Nor can the Commissioner find support for the position that the HVIRA is a fitness statute in the Knox Bill or its legislative history. The Knox Bill, in addition to enacting the HVIRA, amended CAL. CODE CIV PRO 354.5, which "authorize[d] those person[s] to bring legal action to recover on a claim arising out of an insurance policy or policies

purchased or in effect in Europe before 1945 from a specified insurer." AB 600, State Assembly, 1999-2000 Reg. Sess. (Ca. 1999). The Knox Bill's author clearly articulated that its target was Europe: "According to the author, European insurers refused to pay claims to Holocaust survivors and their families, or failed to follow up on claims they had reason to believe were due. Some of these insurers have affiliates operating in California." ER 2667. Assemblyman Knox introduced "AB 600 in order to ensure that Holocaust victims or their heirs can take direct action on their own behalf with regard to family-owned insurance policies." ER 2663, 2670, 2675, 2687, 2695.

C. California Has No Nexus With The Transactions Or Insurers It Seeks To Regulate.

Where a "State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional." *Allstate Ins. Co.*, 449 U.S. at 310-11. Here, California has no identifiable contact with either the parties or the transactions which are the target of the HVIRA. Accordingly, the HVIRA does not comport with the requirements of the Due Process Clause.

In *Gerling v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001), the Eleventh Circuit was faced with an identical record relating to the Gerling Companies, their German affiliates, and a materially identical Florida statute. California, just as Florida, has no contacts with either the Gerling Companies' German affiliates or the transactions it seeks to investigate:

> [the] German companies [are] based in Cologne; they are not registered to do business in the state, and there is no evidence that these German

> insurers have any independent contacts with Florida other than to the extent some current Holocaust-era policyholders or their beneficiaries may currently reside in the state. There is no record evidence that the Plaintiffs have possession, custody, or "control" – in the legal or practical sense – over the records or activities of GKL or GKA.

Gallagher, 267 F.3d at 1231. The fact that some small portion of Holocaust survivors relocated to California after the Second World War is not a sufficient predicate upon which to base jurisdiction. This Court has held that "a postoccurence change of residency to the forum state – standing alone – was insufficient to justify application of forum law." *Allstate Ins. Co.*, 449 U.S. at 311 (citing *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 179 (1936)).

The Florida Commissioner recognized that jurisdictional flaw, and, on appeal attempted to recast the Florida Act as a reporting or fitness statute. The Eleventh Circuit held the statute unconstitutional because Florida had no nexus with the subject matter or entities it sought to regulate:

> The reporting provisions pertain to, and as a practical matter unquestionably seek to regulate, a subject matter – the German affiliates' payment or non-payment of Holocaust-era policy claims – with no jurisdictionally significant relationship to Florida .

Gallagher, 267 F.3d at 1238.

The Eleventh Circuit, in rejecting the argument that the Florida Act was a fitness statute, refused to ignore the Florida

Legislature's statement of purpose or the statute's obvious subject matter:

> The express purpose of the Act reaches well beyond determining the fitness and potential financial liabilities of Florida insurers; indeed, it has little or nothing to do with that subject. We are unwilling to ignore the Florida Legislature's clear statutory statement of purpose in favor of the Commissioner's litigating position (which the Legislature did not endorse . . .)

Id. at 1240.

Just as in Florida, California's Legislature stated that the HVIRA's purposes was to compel European insurance companies to produce policy information to facilitate payment of claims. CAL. INS. CODE. § 13801. California simply has no nexus with the European insurers or transactions at issue. Accordingly, California lacks the necessary legislative jurisdiction to act in this area.

II. THE HVIRA VIOLATES THE COMMERCE CLAUSE

A. The HVIRA Constitutes Impermissible Extra-territorial Regulation.

The HVIRA violates Commerce Clause restrictions because of its extraterritorial application and effect. The Commerce Clause "precludes application of a state statute to commerce that takes place wholly outside of the State's borders, irrespective of whether the commerce has effects within the State." *Edgar v. MITE Corp.*, 457 U.S.

624, 642-43 (1982); *Healy v. Beer Institute*, 491 U.S. 324, 336-37 (1989).

This Court's decisions concerning the extraterritorial effects of state economic regulations "stand at a minimum" for three propositions. *Healy*, 491 U.S. at 336. *First*, the Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the state's borders, irrespective of whether there are effects within the state. *Id. Second*, a statute that controls commerce occurring wholly outside the boundaries of a state exceeds the inherent limits of the enacting state's authority and is invalid regardless of whether such extraterritorial reach was intended by the legislature. *Id.* "The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Id. Third*, the practical effect of the statute must be evaluated by also considering how the challenged statute may interact with the "legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Id.* "Generally speaking, the Commerce Clause protects against the inconsistent legislation arising from the projection of one state's regulatory regime into the jurisdiction of another." *Id.*

Under the principles enunciated by this Court in *Healy*, the HVIRA is a classic example of impermissible extraterritorial regulation. First, it seeks information solely on transactions that occurred outside the State of California. The information sought by the HVIRA exclusively involves insurance transactions entered into in Europe between European parties under European law. Second, the "practical effect" of the HVIRA is to control conduct beyond California's borders. It requires European insurers to take

affirmative acts in violation of their own laws (*see Statement, supra*, at § B, 1). In fact, the Ninth Circuit acknowledged the potential extraterritorial impact of the HVIRA. *See* Pet. App. 44a ("HVIRA's reporting requirements might force a 'related' company of a California business to search for information ..."); *see also* Pet. App. 13a ("The California's insurer's employees could travel overseas to examine the documents themselves, or the California insurer could disaffiliate and thus shed any reporting requirement"). Finally, it directly interferes with the "legitimate regulatory regime" of the Federal Republic of Germany. It requires German insurers to disclose information on millions of German insurance policies in violation of German law. It effectively seeks to trump the regulatory authority of the Federal Republic of Germany with respect to insurers domiciled in that nation. The HVIRA is part of California legislation which seeks to supplant German Holocaust compensation laws that have been in effect for 50 years.

B. The McCarran-Ferguson Act Does Not Save The HVIRA.

The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, does not insulate the HVIRA from Commerce Clause restrictions. In *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), this Court held that insurance was "commerce" within the meaning of the Commerce Clause, and therefore, subject to federal regulation. *See also* Cong. Serv. 79th Cong., 1st Sess. 1945, p. 671. Prior to that decision, the power to regulate insurance transactions resided with the states. *See Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 653-54 (1981). In response, Congress enacted the McCarran-Ferguson Act.

The McCarran–Ferguson Act operates to ensure that the power to regulate insurance remains with the states. However, the legislative history of the McCarran-Ferguson Act provides as follows:

> *It is not the intention of the Congress in the enactment of this legislation, to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the South-Eastern Underwriters Association case.* Briefly, your committee is of the opinion that we should provide for continued regulation and taxation of insurance by the States, *subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in Allgeyer v. Louisiana (165 U.S. 578), St. Louis Cotton Compress Co. v. Arkansas (260 U.S. 346), and Connecticut General Insurance Co. v. Johnson (303 U.S. 77),* which hold, inter alia, that a State does not have power to tax contracts of insurance or reinsurance entered into outside its jurisdiction by individuals or corporations resident or domiciled therein covering risks within the States or to regulate such transactions in any way.

Cong. Serv. 79th Cong., 1st Sess. 1945, pp. 671-672 (emphasis added).

"Congress explicitly intended the McCarran-Ferguson Act to restore state taxing and regulatory powers over the insurance business to their *pre-Southeastern Underwriters* scope." *Western & Southern Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 654 (1981); *SEC v.*

National Securities, Inc., 393 U.S. 453, 459 (1968); *Maryland Cas. Co. v. Cushing*, 347 U.S. 409, 411 (1953); *Federal Trade Commission v. Travelers Health Ass'n*, 362 U.S. 293, 300 (1960) ("it is clear that Congress viewed state regulation of insurance solely in terms of regulation by the law of the State where occurred the activity sought to be regulated. There was no indication of any thought that a State could regulate activities carried on beyond its own borders.").

During testimony before the Senate, proponents of the McCarran-Ferguson Act repeatedly emphasized it did not authorize state regulation of extraterritorial activities. *See Travelers*, 362 U.S. at 301 (citing 91 Cong. Rec. 1481, 1483, 1484).[10] For instance, Senator Ferguson specifically stated that a state was not permitted to regulate interstate commerce under the McCarran-Ferguson Act as proposed. Another proponent of the bill testified as follows:

> Mr. President, there is not a line or sentence in the proposed [McCarran-Ferguson] act, as I have read it, which would delegate to any State the power to legislate in the field of interstate and foreign commerce. State regulation must be for the State and not for the United States. The bill does not sacrifice the power of Congress to regulate in the field of interstate commerce. . . .

91 Cong. Rec. at 1483.

10. Proponents of the McCarran-Ferguson Act further argued that the states were in "close proximity" to the people affected by the insurance business, and therefore, in a better position to regulate that business than the Federal Government. *See Travelers*, 362 U.S. at 302 (citing 91 Cong. Rec. 1087; 90 Cong. Rec. 6532). This purpose could not be served if states were permitted to enact regulations of an extraterritorial nature as they could be affecting people in other states which have their own insurance regulators to protect their interests. *Id.*

Prior to *South-Eastern Underwriters*, this Court had recognized the inherent limitations upon a state's power to act extraterritorially. In *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77 (1938), the Court ruled that the Fourteenth Amendment denies the state "power to tax or regulate [a] corporation's property and activities elsewhere." *Connecticut General Life*, 303 U.S. at 81. Similarly, in *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346 (1922), this Court stated that "[i]t is true that the State may regulate the activities of foreign corporations within the State, but it cannot regulate or interfere with what they do outside." *St. Louis Cotton Compress*, 260 U.S. at 349; *see also Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77, 80-81 (1938) ("Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere."); *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494 (1926) (voiding tax, imposed as condition of doing business in state, on receipts of foreign operations of insurer).

As is demonstrated by its legislative history, the McCarran-Ferguson Act does not shield the HVIRA from Commerce Clause scrutiny.

III. THE HVIRA VIOLATES THE FOREIGN AFFAIRS POWER OF THE FEDERAL GOVERNMENT

A. The Constitution Grants The Federal Government Exclusive Authority To Conduct The Nation's Foreign Affairs.

Since this nation's earliest days, the federal government has been vested with the exclusive authority to conduct

foreign affairs.[11] This fact is reflected in the discussions relating to the formation of our Constitution. James Madison proposed that the Constitution should include a class of powers which would regulate the nation's foreign affairs, which he deemed "an obvious and essential branch of the federal administration":

> The second class of powers, lodged in the general government, consists of those which regulate the intercourse with foreign nations, to wit, to make treaties; to send and receive ambassadors, other public ministers, and consuls; to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; to regulate foreign commerce . . .

James Madison, The Federalist Papers, No. 42. Madison reasoned, "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations." *Id.*

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11. The Articles of Confederation gave Congress the "sole and exclusive right and power of" determining peace and war, sending and receiving ambassadors, entering into treaties and alliances, and appointing courts for the trial of piracies and felonies committed on the high seas. U.S. ART. OF CONFEDERATION, ART. IX. The individual states were not to engage in such activities "without the consent of the United States in Congress." U.S. ART. OF CONFEDERATION, ART. VI. However, the Articles of Confederations proved "inefficient." Alexander Hamilton, Federalist Paper No. 1. The then-existing federal government's major failing "arose over the inability of Congress to frame and implement satisfactory foreign policies." Robert J. Delahunty, *Federalism Beyond the Water's Edge, State Procurement Sanctions and Foreign Affairs*, 37 Stan. J. Int'l L. 1, 14 (2001) (quoting Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution*, 26 (1997)).

At the time the Constitution was ratified, the federal government occupied the foreign relations field. The Constitution gives Congress the power to raise armed forces and used them in war, see U.S. CONST. ART. I § 8, CLS. 11, 12, 16; to undertake treaties with other nations to have the status of the supreme law of the land, *see id.* ART. II, § 2, CL. 2, *see id.* at ART. VI; to send and receive ambassadors, *see id.* ART. II, § 3; *id.* ART. II, § 2, CL. 1; to define offenses against the law of nations, *see id.* ART. I, § 8, CL. 10; and to regulate foreign commerce, *see id.* ART. I, § 8, CL. 3. Peter J. Shapiro, *Foreign Relations Federalism*, 70 U. Colo. L. Rev. 1223, 1228, n.21 (1999).

The Constitution also provides the Executive Branch with the power to speak for the nation in the arena of foreign affairs. The President is vested with the power to make treaties, to nominate and appoint ambassadors, and to receive foreign ambassadors. U.S. CONST. ART. II, 2, CL. 2. Moreover, the President has the exclusive authority to negotiate international agreements. *See United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936).

The Constitution's framers, in granting the federal government those enumerated powers and denying the states the power to act in the international arena (U.S. CONST. ART. I, § 10, CLS. 1, 2, 3), evidenced an intent to vest exclusive authority over foreign affairs with the federal government. "Indeed, the whole frame of the Constitution supports this construction. All the powers which relate to our foreign discourse are confided to the general government." *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570 (1845) (C.J. Taney, plurality); *see also* Shapiro, *Foreign Relations Federalism*, *supra*, at 1229.

This Court has repeatedly re-affirmed the federal government's exclusivity in the foreign affairs arena. *See Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("Our system of government . . . requires that federal power in the field affecting foreign relations be left entirely free from local interference."); *United States v. Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively."); *Zschernig v. Miller*, 389 U.S. 429, 436 (1968) ("The Constitution entrusts [the nation's foreign affairs and international relations] solely to the Federal Government."); *see also Deutsch v. Turner Corp.*, 317 F.3d 1005, 1020 (9th Cir. 2003).

B. The HVIRA Has More Than An Incidental Effect On Foreign Affairs.

The HVIRA represents California's attempt "to settle unpaid or wrongfully paid" Holocaust-era claims. CAL. INS. CODE § 13801. It constitutes an attempt by California to interject itself into an issue which has been the subject of U.S. foreign policy since the end of the Second World War. From the 1945 Potsdam Agreement to the 2000 Executive Agreement, the United States has engaged in an ongoing foreign policy process seeking compensation for Holocaust victims. *See supra*, pp. 18-20.

In *Zschernig*, the Court struck down an Oregon probate law which allowed a foreign citizen to inherit from a decedent's estate if United States citizens could inherit from a decedent's estate in the foreign citizen's country. 389 U.S. at 431. The Court held that the Oregon statute constituted an impermissible intrusion by the state into the field of foreign affairs, stating that "[t]he statute as construed seems to make

unavoidable judicial criticism of nations established on a more authoritarian basis than our own." *Id.* at 440. The Court further held that a state statute is unconstitutional if it has "more than 'some incidental or indirect effect in foreign countries'" or "great potential for disruption or embarrassment" of American foreign policy. *Id.* at 434-35 [internal citation omitted].

The Court reasoned the statute:

> . . . led into minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation whether the fact that some received delivery of funds should 'not preclude wonderment as to how many may been denied 'the right to receive' * * *.' [citation omitted]
>
> That kind of state involvement in foreign affairs and international relations – matters which the Constitution entrusts solely to the Federal Government – is not sanctioned . . . .

Id. at 435-36.

1. The HVIRA Has Led to Minute Inquiries Into the Administration of German Law.

Like the statute at issue in *Zschernig*, the HVIRA has "led into minute inquires concerning the actual administration of foreign law, [and] into the credibility of foreign diplomatic statements." *Zschernig v. Miller*, 389 U.S. at 435-36. In this regard, the HVIRA requires the production of voluminous amounts of personal information regarding German insurance

policies in contravention to German data protection laws. ER 1182, 3131. The Federal Republic of Germany, and German authorities charged with the enforcement of those laws, have determined that compliance with the HVIRA would subject German companies to civil and criminal penalties. *See* Brief of the Federal Republic of Germany, *Amicus Curiae* in Support of Petitioners (dated December 12, 2002) at pp. 4-5. In response, the Commissioner has retained his own German data protection "experts" to challenge the official pronouncements of the German Government. ER 1921. While defending the HVIRA as "regulation of California insurers," the Commissioner nevertheless suggests, that he has a better understanding of German law than do the German authorities charged with the administration of that law. The Commissioner's criticism of the "actual administration" of German law demonstrates the incompatibility of the HVIRA with the principles articulated in *Zschernig*.

Various other features of the HVIRA reflect hostility to the operation of German law. Examples include the HVIRA's definition of the term "proceeds" which effectively "legislates away" post-war German currency reform. CAL. INS. CODE § 13802. In addition, in its application, the HVIRA attempts to supplant 50 years of Holocaust reparations legislation in Germany. In sum, the HVIRA conflicts with or criticizes German law and is viewed by that nation as an "affront" to its sovereignty. *See* Brief of the Federal Republic of Germany, *Amicus Curiae* in support of Petitioners (December 12, 2002), at p. 2; ER 844.

2. The HVIRA Has a Direct Effect in Germany.

The HVIRA requires direct conduct in Germany and other European countries. The HVIRA compels insurers to

"come forth with any information they possess that could show proof of insurance policies held by Holocaust victims and survivors." CAL. INS. CODE § 13801(d). It exclusively seeks information regarding "insurance policies in force in Europe at any time between 1920 and 1945." CAL. INS. CODE § 13804(a). Under the HVIRA, the nominally regulated California companies merely serve as a conduit for European insurance information.

The HVIRA's requirements can only be fulfilled if companies located in Germany and other European nations assemble and produce the information demanded. As demonstrated above, such companies face civil and criminal penalties if they disclose this information. The HVIRA has clear and direct effects in Germany and elsewhere in Europe.

3. The HVIRA Conflicts with U.S. Foreign Policy and Has Great Potential for Disruption and Embarrassment.

"For the last 55 years, the United States has sought to work with Germany to address the consequences of the National Socialist era and World War II through political and governmental acts between the United States and Germany." Pet. App. 166a. Those political and governmental acts have resulted in several treaties, including the Transition Agreement. *See* 332 U.H.T.S. 219. Under the Transition Agreement, the Federal Republic of Germany accepted the responsibility to compensate victims of Nazi oppression. *Id.* at Ch. 4. In fulfillment of that responsibility, Germany has provided, "in an unprecedented manner, comprehensive and extensive restitution and compensation to victims of National Socialist persecution." Pet. App. 155a. Those

reparations efforts have been ongoing for over 55 years and now total over $100 billion in payments to the victims of World War II. Brief of the Federal Republic of Germany, *Amicus Curiae* in Support of Petitioners (dated December 12, 2002) at p. 6.

Most recently, the United States entered into the Executive Agreement with Germany announcing its support for the Foundation. Pet. App. 153a-157a; *see also supra*, at pp. 17, 23-24. "The Foundation is a fulfillment of a half-century effort to complete the task of bringing justice to victims of the Holocaust and victims of National Socialist persecution." Pet. App. 166a. The Executive Agreement's support of the Foundation is the United States' attempt to ensure an "enduring legal peace" for German companies, which includes the Gerling Companies. Pet. App. 153a. The HVIRA threatens to impair the United States' long standing efforts.

The HVIRA represents California's attempt to impair the effective exercise of the federal government's exclusive control over foreign affairs. California claims that the HVIRA "is necessary to protect the claims and interests of California residents, as well encourage the development of a resolution to these issues . . . through direct action by the State of California." CAL. INS. CODE § 13804(f). California has declared that the international mechanisms put in place by Germany and by the other European countries, in accordance with agreements with the United States, are not sufficient. As the Ninth Circuit itself has recognized in striking another Holocaust statute on foreign affairs grounds: "California has sought to create its own resolution to a major issue arising our of the war – a remedy for wartime acts that California's legislature believed had never been fairly resolved." *Deutsch*

v. Turner Corp., 317 F.3d at 1023. The HVIRA constitutes an impermissible intrusion into the federal government's exclusive authority over the nation's foreign affairs.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMERICAN INSURANCE ASSOCIATION, AMERICAN RE-INSURANCE COMPANY, *et al.*,

Petitioners,

v.

JOHN GARAMENDI, in his capacity as Commissioner of Insurance for the State of California,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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STATEMENT

California has strong interests in caring for its residents and in protecting them from actual or potential abusive practices by companies licensed to do business in the state. These interests are particularly compelling where the regulated companies are insurers, engaged in a quasi-public business and clothed with a public trust. *Cal. Auto. Ass'n v. Maloney*, 341 U.S. 105, 109-110 (1951); *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 414-415 (1914). Members of the public have a right to expect their government to assure that insurers deal truthfully and disclose basic insurance policy information to them.

The HVIRA (California Insurance Code §§ 13800-13807) is not a foreign policy initiative. The statute makes no political statement, expresses no criticism or hostility toward any foreign government, and indeed is not aimed at foreign governments at all. It is an insurance regulation that seeks disclosure of withheld insurance policy information from private companies doing business in California. That information will benefit California residents who have been repeatedly and systematically denied access to it for decades.

In addition to benefiting victims of insurer stonewalling, the HVIRA furthers a number of legitimate consumer protection interests. It protects California against insurance companies that are engaging in, or might be influenced by companies that are engaging in, the widespread practice of wrongfully withholding insurance information from insureds and beneficiaries. It accomplishes this by requiring all California licensees to disclose such information if they or their affiliates possess it, or have their licenses suspended. This satisfies the legislative goal of ensuring that no insurance company or family of companies persisting in these practices will have access to the California market, and serves notice to all insurance companies that the state will take swift and strong measures to protect the interests of insureds – all of which results in a more secure marketplace for California insurance consumers. In addition, the information sought – information establishing the existence of policies – will

provide the state with at least a first step in evaluating whether families of insurers have engaged in a pattern and practice of falsely denying the existence or record of those policies to inquiring policyholders and beneficiaries.

In today's global society, with substantial business being conducted in the United States by multinational corporations, state laws often have international effects. State regulators routinely request information from licensees about foreign affiliates and foreign transactions. In the present case, petitioner Generali is a multinational that itself does business in California and abroad. All of the other insurance company petitioners are members of international insurance holding company systems – multinational conglomerates whose members are linked together through various control relationships. Jnt. App. 40.[1] These relationships provide substantial benefits to the system's members, as the record in this case amply reflects. See 1-ER 697-699, 703-710, 722-747, 879-900, 903, 1026-1069. As *amicus* Chamber of Commerce has pointed out in its brief (p. 17), "[c]ompanies depend on complex, far-flung networks of corporate affiliations to remain competitive in the global marketplace."

Those relationships also carry obligations. Under the laws of California and virtually every other state,[2] membership in such holding company systems obligates licensees to provide information about the conduct of other

[1] "Jnt. App." refers to the Joint Appendix filed with petitioners' brief in this Court. "Resp. App." and "App." refer, respectively, to the appendices attached to the Commissioner's brief and the AIA petitioners' brief in connection with the certiorari petitions filed in this Court. "1-ER" refers to the Excerpt of Record in the Court of Appeals on the appeal from the preliminary injunction in this action (Nos. 00-16163, etc.). "2-ER" refers to the Excerpt of Record in the Court of Appeals on the appeal from the summary judgment in this action (Nos. 01-17023, etc.).

[2] See *Alleghany Corp. v. McCartney*, 896 F.2d 1138, 1140 (8th Cir. 1990).

members of that system. See, e.g., Cal. Ins. Code §§ 1215.2(d)(5), 1215.4(g) and 1215.6. Such membership requires cooperation by foreign affiliates in reporting on foreign transactions. See, e.g., Cal. Ins. Code § 1215.4(g).

Under this Court's precedents, a state's commercial regulations are not unconstitutional because they have adverse consequences for foreign companies, are strongly protested by foreign governments, and are expressly disapproved by the Executive Branch, so long as they are not disapproved by Congress. *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 320-331 (1994). Nor may the Executive Branch, through an expressly *non-preemptive* executive agreement or by endorsing a private, voluntary claims organization, unilaterally supersede such state regulations. If the Executive perceives that the HVIRA interferes with the Nation's ability to speak with one voice, it may seek a remedy from Congress.

Under petitioners' expansive (and standardless) reading of the foreign affairs power, however, generally accepted reporting statutes would be vulnerable to attack on the ground that they reflect state "foreign policy" or interfere with Executive Branch foreign relations. Petitioners' theory would invalidate many state regulatory regimes whose constitutionality has never before been doubted, eviscerate this Court's Foreign Commerce Clause jurisprudence, and call upon courts to determine the "foreign affairs" implications of state regulations on a case-by-case basis. State regulatory authority, if subordinated to the views and preferences of the Executive Branch and foreign governments, will become uncertain.

Similarly, if petitioners' due process and Commerce Clause arguments are successful, then out-of-state conduct in which the states have legitimate regulatory interests could become immunized from regulatory scrutiny. A regulated company could assert that it is not required to disclose fraudulent conduct committed by its parent company in Europe because the "subject matter" of that conduct was European transactions involving only Europeans.

Regulatory disclosure could be thwarted by locating critical documents in the hands of off-shore affiliates. Petitioners' arguments, if accepted, would threaten the entire system of holding company regulation.

Finally, petitioners' assertion that the "actual purpose" of an economic regulation controls legislative jurisdiction is both unprecedented and unwise. If accepted, such a rule would undermine decades of economic due process law and create doubts about existing and future statutes that serve state regulatory interests but lack whatever magic terms or legislative history are deemed necessary to evidence the "correct" purpose.

A. The HVIRA And The State Interests It Serves.

1. The Plight Of Holocaust Survivors.

Thousands of Holocaust survivors live in California. Jnt. App. 29-30; Resp. App. 24; Cal. Ins. Code § 13801(d). These survivors are elderly and many live in poverty. Jnt. App. 29-30. Although life and other insurance was common in Europe in the 1920s and 1930s (Jnt. App. 30), very few Holocaust survivors have proof of insurance or even know which company issued insurance to their family when they were children. Jnt. App. 25, 31, 33, 34; Resp. App. 23-25, 31; 1-ER 400-489; 2-ER 570-580. In most cases, insurance company records are the only existing proof of the policies. Cal. Ins. Code § 13801(c).

Yet, many insurers have refused to make that information available, while at the same time denying numerous claims because the claimants cannot provide proof of insurance. Jnt. App. 33-37; Resp. App. 23-24. Substantial evidence exists that insurance companies have repeatedly deceived Holocaust survivors, lied to survivors about the existence of policies or policy records, and demanded that survivors produce documents that the companies knew survivors did not have, such as the actual policies,

cancelled checks, and death certificates.[3] The head of the International Commission On Holocaust Era Insurance Claims ("ICHEIC"), former Secretary of State Lawrence Eagleburger, has publicly accused one of the ICHEIC members, Allianz, of failing to pay *any* of thousands of claims submitted to ICHEIC. Jnt. App. 69. In response, Allianz pointed out that 92% of the claims did not name any insurance company, because survivors did not recall the companies that sold the policies. *Id.* Allianz has thus far agreed to publish only a handful of policyholder names through ICHEIC, and is expected to publish only a limited number of additional names in the future. Resp. App. 26, 27.

One of the petitioners, Generali, was sued in 1997 for failing to disclose policy information to the family of a Holocaust victim. 1-ER 751-781. Generali is an Italian company licensed to transact insurance business in California since 1935 and subject to jurisdiction in California. 1-ER 873. Generali repeatedly denied that it ever issued a policy to the family and claimed that all its files on its Eastern European policies were lost. 1-ER 751-781; *1998 Hearing* at 114. In fact, Generali has copies of its Eastern European policies, including the family's, stored in its warehouse in Trieste, Italy (1-ER 767; 2458; *1998 Hearing* at 114) and has computerized information on approximately 340,000 policies issued between 1920 and 1945. Jnt. App. 38. Yet, Generali has refused to make most of that information available, publishing only the barest of policyholder lists through ICHEIC. Jnt. App. 38.

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[3] See, e.g., *The Restitution Of Art Objects Seized By The Nazis From Holocaust Victims And Insurance Claims Of Certain Holocaust Victims And Their Heirs Before The House Comm. On Banking & Fin. Servs.*, 105th Cong. 82-124, 131, 137-141, 158 (1998) (the "*1998 Hearing*"); *The Status Of Insurance Restitution For Holocaust Victims And Their Heirs Before The House Comm. On Gov't Reform*, 107th Cong. 44-51, 64, 69, 134 (2001) (the "*2001 Hearing*").

2. The California Legislature's Response To Decades Of Insurer Stonewalling And Bad Faith.

In 1999, the California legislature unanimously passed the HVIRA, a reporting statute that responds to the persistent refusal of insurance companies to disclose essential policy information. Disclosure of this information will assist survivors in deciding whether and against whom they may have an insurance claim. Survivors may then decide whether they wish to pursue a claim, and if so, in what manner (*e.g.*, informally with the insurer, or through the ICHEIC, or through litigation).

The HVIRA imposes the obligation to obtain this policy information on insurers doing business in California if the insurer or a related company sold insurance policies in Europe from 1920 through 1945 and if the information is in the possession, custody or control of the licensee or any of its related companies. App. 22a, n.11. The legislature expressly recognized the persistent and present refusal by insurance companies to disclose necessary information, and it determined that insurers doing business in California should take responsibility to obtain that information to prevent further concealment from survivors and their families. Cal. Ins. Code § 13801(a)-(f); App. 25a.

As the Court of Appeals concluded, the HVIRA reflects a number of state regulatory interests. App. at 16a, 22a, 23a, 25a. The Court of Appeals also found that the HVIRA is rationally related to these legitimate government interests. App. at 22a-27a.[4]

[4] The HVIRA is broadly drafted for a number of legitimate reasons. See Jnt. App. 25-27, 37; Resp. App. 25-26, 27-28; 2-ER 574, 575, 588-598. Moreover, as the Court of Appeals found, the statute's preclusion of foreign law defenses does not violate due process. App. 22a-27a.

3. Petitioners Mischaracterize The HVIRA.

Petitioners repeatedly mischaracterize the HVIRA, claiming that its goal is to affect foreign policy; that its purpose is to interfere with international means for resolving Holocaust claims; that it "regulates" foreign insurance transactions and foreign insurers; that it "fosters" and "encourages" litigation in California courts; and that it forces payment of claims. See, e.g., AIA Brief at 11, 26. As the Court of Appeals has twice ruled, however, such contentions "mischaracterize HVIRA as a matter of law." App. at 9a, 43a. The HVIRA does not regulate either foreign transactions or foreign companies. App. at 9a, 15a, 16a, 43a-45a.

It does not demand, require or force the payment of any claims, and it makes no judgment as to whether policies have been properly paid. Nor does it encourage private litigation in California or elsewhere. Quite the contrary, the statute seeks only the disclosure of insurance policy information, which Members of Congress and others have recognized is essential to *any* resolution of Holocaust-era insurance claims, including resolution through ICHEIC. See, e.g., 2-ER 1955; *1998 Hearing* at 100-102, 105-107 (Statements of Congressmen Foley and Engel) (describing the necessity of *compelling* public disclosure of policy information by insurance companies through legislation).

Petitioners and *amici* also improperly resort to extensive citation and discussion of other California statutes that are *not* part of this litigation and that are *not* before this Court, all in an effort to blur the limited focus of the HVIRA. California Code of Civil Procedure Section 354.5 is the primary object of petitioners' attention. That statute provides a California venue for claims made against insurers doing business in the state or whose contacts would already subject them to jurisdiction there, and it

extends the statute of limitations on those claims to 2010.[5] Petitioners also refer to California Insurance Code Section 790.15, which authorizes the Commissioner to suspend an insurer's certificate of authority if it or its affiliate has failed to pay a valid Holocaust-era insurance claim.

Both the District Court and the Court of Appeals rejected identical attempts by petitioners to conflate the HVIRA with these other statutes. App. at 6a, 7a, 10a, 16a, 17a, 38a, 43a, 86a, 87a. The District Court dismissed all challenges to these other provisions for lack of standing. Petitioners never appealed that ruling, and both the District Court and Court of Appeals expressly declined petitioners' invitation to link those statutes with the HVIRA. *Id.* Indeed, petitioner Generali itself has argued in unrelated litigation that the HVIRA is separate from Code of Civil Procedure Section 354.5. Resp. App. 71.

B. The Federal Government's Limited Involvement In Resolution Of Private Holocaust-Era Insurance Claims.

The United States government has no history of actively addressing Holocaust-era claims against *private insurance companies*. The United States was a participant in a 1952 treaty that led to internal German legislation restricted to limited compensation of German nationals by the German government for a variety of injuries. App. 97a; 1-ER 553-562. Neither that legislation nor any other post-war German treaty obligated German insurers to provide any policy information or compensation, or prohibited the assertion of contractual claims directly against insurance companies. *Id.*

The Executive Branch, Members of Congress and the Chairman of ICHEIC have all recognized that resolving private insurance claims is a matter for the states, not the

[5] The statute does *not* confer personal jurisdiction over foreign affiliates, does *not* create any new right of action, and does *not* impose liability on the local licensee under policies issued by a foreign affiliate.

federal government. Thus, at a Congressional hearing relating to Holocaust-era claims, Deputy Secretary Eizenstat agreed that "[i]nsurance is regulated by the states, and we have very little influence." *Restitution Of Holocaust Assets Before The House Comm. On Banking & Fin. Servs.*, 106th Cong. 64 (2000) (the "*2000 Hearing*"). Congressman Leach also acknowledged "the decision of the United States Congress, in effect, either to devolve or not to assume responsibility for basic insurance regulation, which gives the states a significant role." *1998 Hearing* at 157; App. 50a. See also *2000 Hearing* at 151, 159 (testimony of Lawrence Eagleburger acknowledging that insurance is fundamentally a matter of state regulation, and state regulators have substantial authority to obtain insurance company cooperation).

Petitioners nevertheless claim that "since the post-war period in Europe, the United States has remained 'actively involved in Holocaust victims compensation efforts.'" AIA Brief at 3. Petitioners describe at some length what they consider to be the two primary efforts: (1) ICHEIC, and (2) the German Foundation agreement. AIA Brief at 3-8.

1. ICHEIC

Founded in 1998 by insurance regulators from California and other states, ICHEIC is a voluntary, private organization consisting of five insurance companies, state insurance regulators, Jewish and survivor organizations, and the State of Israel. Jnt. App. 32. Representatives from various countries, including the United States, have observer status only. *Id.*[6] ICHEIC's purpose is to pursue the goal of resolving certain insurance claims of Holocaust victims. *Id.* An insurance company's participation in ICHEIC does not afford "legal peace" as to claims against that company. Jnt. App. 33.

[6] Petitioners incorrectly state that ICHEIC was the product of a federal government agreement. AIA Brief at 2. It was not.

Many companies that wrote Holocaust-era insurance are not members of ICHEIC, with the five insurance company members of ICHEIC representing only approximately 35.5% of the pre-World War II European insurance market. Jnt. App. 32. While a number of the petitioners or their affiliates are ICHEIC members, several are not. Jnt. App. 32, 43.

Claims against ICHEIC member companies may be made through ICHEIC. ICHEIC's standards of proof generally require documentation to support the existence of a policy and are quite stringent, particularly as applied to claimants who are unlikely to have such documentation. Jnt. App. 34-37. And, in practice, the insurance companies participating in ICHEIC have rejected most claims and have declined to make offers on any claim that is lacking in documentary proof. See *In re Assicurazioni Generali S.p.A. Holocaust Insurance Litigation*, 228 F. Supp. 2d 348, 357 (S.D.N.Y. 2002) (noting that ICHEIC had made only 797 offers for payment in response to over 77,000 claims); Resp. App. 32; Jnt. App. 35-37.

ICHEIC has requested that its five member insurance companies publish lists of unpaid policies issued to Holocaust victims. Jnt. App. 37. That request, however, like every other aspect of ICHEIC, is based on voluntary compliance, and the publication of lists has been inadequate and incomplete. Jnt. App. 37; Resp. App. 26-27, 32; 1-ER 529, 542-543. Testimony from a recent Congressional hearing reveals that less than 10,000 policyholder names had been published by the companies that are members of ICHEIC, most coming from just one company. Resp. App. 27, 32. A federal court has recently described ICHEIC as "manifestly inadequate because it lacks sufficient independence and permanence," characterizing it as "the company store." *In re Assicurazioni Generali S.p.A. Holocaust Insurance Litigation,* 228 F. Supp. 2d at 357. ICHEIC's meetings are not public, and records of ICHEIC meetings are not available to the public. *2001 Hearing* at 59-60.

2. The German Foundation Agreement

In early 1999, German companies that were subject to claims by slave laborers, forced laborers, insurance claimants and others began negotiating with the plaintiffs' attorneys and various countries whose citizens were subjected to slave and forced labor. App. 51a, 129a. Those negotiations led to an agreement by the German government and companies to fund a Foundation to pay claims against German companies arising from the Nazi era. App. 51a, 129a. The vast bulk of the funds are for payment of slave and forced labor claims. App. 129a.

Significantly, with respect to insurance, the German Foundation settlement applies *only* to insurance policies written by *German* companies. Resp. App. 47-48, 51-52 n.7; 1-ER 550-551. Most of the petitioners wrote or have European affiliates that wrote insurance in many European countries other than Germany, and those companies are not part of the German Foundation settlement. See, e.g., Jnt. App. 37; 1-ER 551, 1709, 1719-1720. In addition, the Foundation settlement does not require German insurance companies to join ICHEIC. App. 153a-168a.

In July 2000, Germany and the United States entered into an Executive Agreement regarding the Foundation settlement. App. at 51a, 129a, 153a-168a. That agreement is not a treaty, is not even a "government-to-government claims settlement agreement," and expressly provides that it does not preempt state laws like the HVIRA. Resp. App. at 45-46, 48-49; *2000 Hearing* at 49 (Eizenstat Statement). Instead, the agreement states that German companies desire "legal peace," and that in any case filed in a court in this country against a German company arising from the Holocaust-era, the United States will "inform its courts . . . that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving such claims." App. at 153a, 156a. With respect to state and local regulatory actions, the agreement provides only that the United

States will use its "best efforts, in a manner it considers appropriate," to achieve legal peace. App. at 156a.

The U.S. government has not undertaken a duty or made any promise to achieve legal peace for German companies against state litigation or regulatory action. Resp. App. 47-48, 51-52 n.7. To the contrary, the agreement recognizes that the United States' policy interests concerning the Foundation do not "in themselves provide an independent legal basis for dismissal" of lawsuits against German companies (Resp. App. at 45-46), and the United States has also acknowledged that the agreement does not have preemptive effect. Resp. App. at 48-49; App. 167a. The United States has similiarly explained that the agreement's contemplation of "legal peace" relates to "claims *against* German companies that arise out of the Nazi era," that the HVIRA does not contravene specific provisions of the Executive Agreement, and that this case (which does not involve claims against *any* insurance company) "is not one that implicates the German obligation to make payments from the Foundation." Resp. App. at 51-52 n.7 (emphasis in original).

Nor has the HVIRA precluded consummation or implementation of the Executive Agreement. Resp. App. at 51 n.7. On May 30, 2001, after the Court of Appeals' first decision in this case, the German Bundestag determined that adequate "legal peace" existed, and authorized the Foundation to make funds available for the payment of claims. Resp. App. at 53-54. On October 16, 2002, after the Court of Appeals' second decision in this case, German insurance companies reached agreement with ICHEIC to coordinate their claims handling and other procedures with that organization. See "Lodging", submitted in support of the Gerling Petition (No. 02-733) at L-70 to L-180.

C. Congress Has Not Disapproved Statutes Like The HVIRA. To The Contrary, Congress Has At Least Implicitly Approved The HVIRA.

Congress is well aware of the HVIRA and the objections to it lodged by foreign governments and the

Executive Branch. App. 49a-50a, 136a-137a, 174a-180a; *2001 Hearing* at 52. For example, Executive Branch representatives have testified before Congress that, in their view, the HVIRA interferes with foreign policy interests. See, e.g., App. 136a-137a (testimony of Deputy Secretary Eizenstat). Congress, however, has not expressed any disapproval of the HVIRA in response to such testimony. Quite the opposite, members of Congress have endorsed state efforts and have praised the HVIRA as having produced positive results. App. 49a-50a; Resp. App. 33; *1998 Hearing* at 88 (Statement of Senator D'Amato); *1998 Hearing* at 185 (Statement of Congressman Leach); *2000 Hearing* at 63 (Statement of Congressman Sherman).

On June 23, 1998, Congress enacted the U.S. Holocaust Commission Act of 1998, Public Law 105-186, 112 Stat. 611 (the "HCA"). Petitioners argue that the HCA "constituted Congress's express command to the President to take the initiative for the United States among the international community." AIA Brief at 30. The HCA is no such thing. If anything, it reflects Congressional acknowledgment that (1) the states play a vital role in the resolution of Holocaust-era insurance claims, and (2) Congress, rather than the Executive, is the federal branch with ultimate authority to address those claims.

The HCA created a Presidential Commission to study Holocaust victims' assets in the United States. Notably, with respect to insurance policies, the HCA directs the Commission to "take note of the work of the National Association of Insurance Commissioners" (the state insurance regulators) and to "encourage the National Association of Insurance Commissioners to prepare a report on the Holocaust-related claims practices of all insurance companies, *both domestic and foreign*, doing business in the United States at any time after January 30, 1933, that issued any ... insurance policy to any individual on any list of Holocaust victims." *Id.* § 3(a)(4)(A) (emphasis added). The information to be included in the report prepared by the state insurance commissioners is in several respects similar to the information sought by the HVIRA. *Id.* § 3(a)(4)(B).

The HCA also directs the Commission to submit a report to the President with any recommendations for legislative, administrative or other actions as it deems necessary or appropriate. *Id.* § 3(d)(1). Petitioners assert that this language "clearly indicates Congress' understanding that the President would proceed where possible through administrative and diplomatic channels." AIA Brief at 30. Petitioners, however, omit the very next portion of the statute, which provides that after receipt of the Commission's report, "the President shall submit *to Congress* any recommendations for legislative, administrative or other action that the President considers necessary or appropriate." *Id.* § 3(d)(2) (emphasis added). Thus, the HCA clearly recognizes that the President does not have the final word on the subject of Holocaust-era insurance claims.[7]

SUMMARY OF ARGUMENT

1. The HVIRA does not invade an area of exclusive federal power over foreign relations. Nothing in the Constitution's text, structure or history supports petitioners' claim that the federal foreign relations power displaces state power over a traditional and vital area of commercial regulation – insurance. The HVIRA is a commercial regulation of private insurance companies that, at a minimum, has been tacitly approved by Congress and is not preempted by any federal statute, treaty or executive agreement. Even though the U.S. Executive Branch and certain foreign governments have objected to it, the HVIRA is constitutional so long as Congress – the Nation's voice in matters of foreign commerce – has not disapproved it. *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994). The authority primarily relied on by petitioners, *Zschernig v.*

[7] Petitioners (AIA Brief at 30) misstate the remarks of Representative Foley, who did not mention the President at all in explaining Congress' intent for the commission to work *with state insurance regulators* to gather information to "begin to get to the bottom of unpaid insurance claims." 144 Cong. Rec. H4271 (daily ed. June 9, 1998).

Miller, 389 U.S. 429 (1968), prohibits states from criticizing or expressing hostility toward foreign governments. The HVIRA does not do this.

2. The HVIRA does not violate the dormant Commerce Clause. The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, exempts state insurance regulations from *all* Commerce Clause restrictions. *FTC v. Travelers Health Ass'n*, 362 U.S. 293 (1960), relied on by petitioners, did not limit the states' immunity from Commerce Clause attack under McCarran-Ferguson, but instead involved only an interpretation of another provision of McCarran-Ferguson that deals with the limited exemption from the Federal Trade Commission Act for the business of insurance. Finally, even in the absence of McCarran-Ferguson, the HVIRA does not violate the Commerce Clause because it is not an extraterritorial law; it seeks only information from California licensees and does not affect the competitive business practices of any company outside California.

3. The HVIRA is within California's legislative jurisdiction under the Due Process Clause. The statute does not regulate foreign companies or the substance of foreign transactions. Instead, it seeks information from California-licensed insurers. A state has jurisdiction to seek information about conduct occurring elsewhere if the state has a legitimate interest in obtaining that information. Those interests, rather than an inquiry into the statute's "actual purpose," determine whether the state's exercise of legislative jurisdiction is fundamentally fair and therefore proper. Here, as the Court of Appeals held, the HVIRA is rationally related to a number of legitimate state interests, and those interests are more than sufficient to satisfy both the rational basis and minimum contacts test.

ARGUMENT

I. THE HVIRA DOES NOT INVADE AN AREA OF EXCLUSIVE FEDERAL POWER OVER FOREIGN RELATIONS

Insurance is a quasi-public industry that, with Congress' express approval, has long been regulated by the

states. See McCarran-Ferguson Act, 15 U.S.C. §§ 1011, 1012(a). The HVIRA, a reporting statute that requires disclosure of information by private insurance companies doing business in California, furthers important state interests and is not directed at any foreign government. Yet, petitioners claim that the HVIRA unconstitutionally encroaches on a matter of foreign relations reserved to the federal government. No authority supports this remarkable claim of federal displacement of state power over a traditional area of commercial regulation.

The Constitution's text proscribes state activities that may affect foreign relations in three principal ways. Article I, Section 10 bars states from certain specific activities. Article VI makes federal treaties and statutes supreme over state law. And certain grants of power to Congress in Article I, Section 8 exclude states from some fields by negative implication – in particular, the dormant Commerce Clause precludes certain state commercial regulations. Petitioners do not rely on any of these textual provisions aside from the dormant Commerce Clause (an argument addressed in Section I.B.3 below).

Beyond the Constitution's express language, this Court has identified only two ways that federal foreign relations power may override state regulations, neither of which is applicable here. A single decision, *Zschernig v. Miller,* 389 U.S. 429 (1968), recognized a "dormant" federal foreign relations power that excludes states from certain foreign relations activity even in the absence of inconsistent federal activity. Though petitioners seek to make much of *Zschernig*, that case involved the distinct circumstance of a state law that, as applied, was a vehicle for criticism and hostility toward foreign governments. The HVIRA does not do this. Indeed, the HVIRA is not addressed to foreign governments at all, and does not reflect any attempt by the state to interact with any foreign government. It is simply a regulation of private business.

This Court has also held that under some circumstances, the President may enter into executive agreements

with foreign nations that supersede state legislation in much the same manner as treaties. See, e.g., *United States v. Belmont,* 301 U.S. 324 (1937). Petitioners discuss certain executive branch initiatives in an attempt to invoke this idea of "executive preemption." But (1) the executive agreements relied upon by petitioners are expressly not preemptive (and in any event do not affect all of the petitioners); (2) Congress has not authorized the President to address Holocaust-era insurance claims to the exclusion of the states; and (3) this Court has rejected the suggestion that executive branch initiatives, unsupported by Congress and not reflected in preemptive executive agreements, can override state commercial regulation. See *Barclays*, 512 U.S. at 328-331.

A. The HVIRA Does Not Violate The Constitution's Allocation Of Powers Between The States And The Federal Government.

Petitioners do not contend that the HVIRA is inconsistent with any provision of the Constitution's text, or is preempted by any federal statute or treaty. Rather, petitioners claim a much broader principle, supposedly derived from the Constitution's history and structure, that state commercial regulations must give way, even in the absence of the ordinary means of preemption, when the Executive Branch says they affect foreign relations. No such principle exists.

First, the Constitution's text, history and structure do not support this principle. Petitioners make much of the fact that state activities under the Articles of Confederation interfered with the Continental Congress' ability to conduct foreign relations, and that the Constitution was drafted in part to remedy that problem. But they draw the wrong lesson from that history.

The Constitution could have adopted a general rule barring all state regulatory activity with international

implications. Instead, its drafters chose specific means to remedy the defects of the Articles, preserving for the states their power to regulate commercial matters.[8] Thus the Constitution (1) excludes the states from specified foreign relations activities in Article I, Section 10; (2) gives Congress broad powers over foreign commerce (which Congress lacked under the Articles); and (3) makes treaties and federal statutes preemptive of state law (which they were not, under the Articles). The very existence of these carefully crafted provisions balancing federal and state power belies the sweeping but unstated principle petitioners suggest.[9]

Second, no such principle can be derived from more than 200 years of constitutional practice. States routinely regulate foreign companies that do business within the state, often to the detriment of those companies and to the annoyance of the governments of the countries where those companies are located. No state commercial regulation has ever been invalidated by this Court on the grounds of "foreign relations preemption," and such

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[8] Petitioners rely on various out-of-context quotes from leading Framers to bolster their historical contentions. But, read in context, none of these statements support the broad prohibition petitioners suggest. For example, petitioners claim that a quote from James Madison, in *Federalist No. 42*, shows an intent to oust states from regulatory matters with international implications. But *Federalist No. 42* is a defense of *granting* preemptive powers to Congress in foreign affairs; it says nothing about the states' power in the absence of congressional action. See Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 Notre Dame L. Rev. 341, 379-390 (1999) (discussing the Framers' views in this regard).

[9] See Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1642 (1997) ("The most natural inference from [Article I, Section 10] and from the Constitution's enumerated powers structure is that all foreign relations matters not excluded by Article I, Section 10 fall within the concurrent power of the state and federal governments until preempted by federal statute or treaty.").

regulations have been frequently upheld. See, e.g., *Barclays*, 512 U.S. 298. See also Goldsmith, 83 Va. L. Rev. at 1655-1664 (describing how states historically have acted in ways "that either looked like the exercise of foreign relations power or that stirred foreign relations controversy" but were not thought to raise constitutional concerns).

Third, this Court's precedents do not support petitioners' principle. Most of the cases petitioners cite involve one of the specific constitutional grounds discussed above. See, e.g., *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (statutory preemption); *Chy Lung v. Freeman*, 92 U.S. 275 (1876) (dormant Commerce Clause and congressional power over immigration); *Oldfield v. Marriott*, 51 U.S. 146 (1850) (treaty preemption). Far from supporting petitioners, these cases show that the constitutionality of state laws with international implications is ordinarily determined with reference to specific provisions of the Constitution.

This Court has gone beyond the Constitution's text to imply foreign relations limits on the states in two limited circumstances. But both of these involved foreign relations power issues quite distinct from anything relevant here. *Zschernig v. Miller*, discussed below in Section I.B., invalidated a state regulation of inheritance (not a commercial regulation) that, as applied, expressed hostility and criticism toward foreign governments. *United States v. Belmont* and related cases, discussed below in Section I.C., invalidated state laws that conflicted with expressly preemptive executive agreements (which do not exist in this case).

Petitioners seek to construct from the limited holdings of these cases a general principle that states cannot enact commercial regulations with international effects. However, petitioners cannot explain how their principle can be reconciled with constitutional text and history (which contain no evidence of their principle); how such a principle could be limited or applied (since state commercial regulations will inevitably have *some* international effects, and courts will be repeatedly called upon to determine how

much is too much); nor how such a principle can be reconciled with this Court's dormant Foreign Commerce Clause jurisprudence (which provides a more limited and well-defined approach to assessing the constitutionality of state commercial regulations with international effects).

Congress is the voice of the Nation in foreign commerce. *Barclays*, 512 U.S. at 329-330. The dormant Commerce Clause, not the foreign affairs power, is the appropriate doctrine under which to analyze state commercial regulations that are not preempted by any statute or international agreement and do not involve state hostility toward foreign governments. Under the dormant Commerce Clause, state commercial regulations remain constitutional even though they may have adverse consequences for foreign companies, are strongly protested by foreign governments, and are expressly disapproved by the executive branch, so long as they are not disapproved by Congress. *Id.* at 320-331. See also *Wardair Can. Inc. v. Fla. Dept. of Revenue*, 477 U.S. 1, 9-12 (1986); *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983); *Trojan Techs. v. Pennsylvania*, 916 F.2d 903, 913-914 (3rd Cir. 1990). Reading *Zschernig* or executive foreign relations preemption as broadly as petitioners advocate would invalidate the regulations upheld in these cases, eviscerate this Court's Foreign Commerce Clause jurisprudence, and invade state sovereignty over commercial matters.

Congress, though well aware of the HVIRA and of Executive Branch and foreign unhappiness with it, has not disapproved of that statute. If the HVIRA is an irritant to the Executive Branch and foreign governments, there are well-understood remedies that fit within the structure of the Constitution and do no violence to principles of federalism: the Executive can enter into a treaty with those governments or seek relief from Congress.

B. The HVIRA Does Not Invade The "Dormant" Foreign Relations Power.

1. The HVIRA Is Not Unconstitutional Under *Zschernig* Because The HVIRA Does Not Criticize, Or Foster Criticsm Of, Foreign Governments.

The only case in which this Court invalidated a state statute as interfering with the federal foreign relations power in the absence of a preemptive international agreement, statute or constitutional provision is *Zschernig v. Miller*, 389 U.S. 429 (1968). But as the court below found, App. at 55a-59a, *Zschernig* is limited to the distinct circumstance of a state law that fostered criticism and hostility toward foreign governments.

In *Zschernig*, this Court invalidated an Oregon inheritance law that prevented residents of foreign countries from inheriting through Oregon estates unless their government granted reciprocal rights to Oregon residents. Earlier, this Court had upheld a similar California statute, dismissing a claim based on the foreign affairs effects of the statute as "farfetched." *Clark v. Allen*, 331 U.S. 503, 517 (1947). But in *Zschernig*, this Court became concerned that the Oregon statute and others like it, as applied, had become a vehicle for inflammatory, "cold war" criticism of foreign governments – especially Communist governments – by the states. 389 U.S. at 433-435, 439, 440 & nn.6, 8.

It was not the existence of the reciprocal inheritance statutes that caused the constitutional problem (else *Clark v. Allen* would have been decided differently), but the critical, hostile way they were applied. Later cases confirm this reading, applying *Zschernig* by assessing whether the challenged statute, on its face or as applied, criticizes or shows hostility toward foreign governments. Compare *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 56 (1st Cir. 1999) (invalidating under *Zschernig* a state law intended to pressure the Burmese military regime into holding democratic elections), with *Trojan Techs.*, 916 F.2d at 913-914 (upholding under *Zschernig* a state commercial

regulation disadvantaging foreign businesses but not targeting any country or group of countries).

As the court below held (App. 55a-59a), the HVIRA does not raise the diplomatic concerns evident in *Zschernig*, because it does not criticize or show hostility toward foreign governments.[10] It is a commercial regulation of private insurers doing business in California.[11]

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[10] Petitioners claim that the HVIRA somehow insults the sovereignty of foreign nations, especially Germany, either by criticizing Germany's handling of Holocaust-era claims or by conflicting with privacy laws. AIA Brief at 32. The HVIRA obviously takes no position on any action of the German government; it is only directed at private insurers.

Even if foreign privacy laws were a relevant consideration, petitioners have grossly overstated their application here to decades-old historical records. The German data protection law is the only law on which petitioners seriously rely. Most of the petitioners, however, are not German companies. Generali is an Italian company, and it makes no claim that Italian law precludes disclosure. Whether compliance with the HVIRA would violate German law is hotly disputed, with the former head of Germany's Federal Data Protection Commission having concluded that it does not. 2-ER 1708-1768, 1914-1929. The U.S. government sees no reason why 50-year old information should not be made public. *2000 Hearing* at 47 (Eizenstat Statement). Nor is there any evidence in the record that any foreign government has taken or would take steps to prosecute petitioners or their affiliates if they provide the information required by the HVIRA. Finally, no court has held that conflict with foreign law, without more, invalidates local law. See *Societe Nationale Industrielle Aerospatiale v. District Court*, 482 U.S. 522, 544 n.29 (1987).

[11] In *Zschernig*, this Court relied on *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941), for the proposition that the Constitution entrusts "the field of foreign affairs . . . to the President and the Congress." *Zschernig*, 389 U.S. at 432. *Hines*, however, was a statutory preemption case (312 U.S. at 66-67, 74) and does not support a broad reading of *Zschernig*.

Zschernig is not indicative of a sweeping dormant preemption of state regulatory activities with incidental international effects. Even beyond *Zschernig*, such dormant foreign affairs preemption at most implies that the nature of the federal system reserves relations with *foreign governments* to the federal government, even though the Constitution does not explicitly say so. See, e.g., *Hines*, 312 U.S. at 63

(Continued on following page)

2. Expanding The Dormant Foreign Relations Power To Encompass State Commercial Regulations Is Unsupported By Theory Or Precedent And Unworkable In Practice.

States routinely seek information about foreign affiliate companies (including information about foreign transactions) as a condition of doing business in the state. App. 20a, n.10. *Zschernig* did not alter that practice. Indeed, no federal court (except the District Court below) has ever struck down a state commercial regulation under *Zschernig* simply because it had international effects or was protested by foreign governments or the Executive Branch. Petitioners' reading of *Zschernig* would call into question innumerable state activities never before thought constitutionally problematic.

Further, petitioners' reading of *Zschernig* would be unworkable in practice. Read as a limit on hostile acts toward foreign governments, *Zschernig* is relatively easy to apply. Petitioners ask this Court to expand *Zschernig* to establish an amorphous constitutional rule preempting state commercial regulations that potentially cause too much embarrassment to the Executive Branch or may have too many international effects. Under this approach, courts would be repeatedly called on to make "foreign policy" judgments – a task for which courts are not well-suited. See *Container Corp.*, 463 U.S. at 194. Congress, on the other hand, is quite capable of identifying and responding to any adverse effects of state commercial legislation; hence Congress, and not the courts, should be the decisionmaker in this regard. See Goldsmith, 83 Va. L. Rev. at 1664-1689.

("The Federal Government . . . is entrusted with full and exclusive responsibility for the conduct of affairs *with foreign sovereignties*.") (emphasis added).

3. *Barclays*, Not *Zschernig*, Controls This Case Because The Federal Power Relevant To State Commercial Regulation Is The Commerce Power, Not The Foreign Relations Power.

Petitioners' broad view of *Zschernig* conflicts with this Court's subsequent decision in *Barclays*, which shows that state commercial regulations such as the HVIRA are properly analyzed under the dormant Commerce Clause. *Barclays*, a case petitioners barely mention, involved a California state tax law that adversely affected foreign companies by taxing them on their worldwide operations, not just upon operations in California. As with the HVIRA, the law in *Barclays* was protested by foreign companies and governments, and the U.S. Executive Branch expressed its view that the law had adverse effects upon international diplomacy. 512 U.S. at 324-326 & n.22, 328-329 & n.30.

This Court granted certiorari in *Barclays* to consider the California law under the dormant Foreign Commerce Clause and under *Zschernig*.[12] Its opinion upholding the law addressed only the Commerce Clause, but the law could not have been upheld unless this Court thought the *Zschernig* claim failed as well. Presumably, then, in the case of a commercial regulation that does not criticize foreign governments, no analysis is required beyond the Foreign Commerce Clause.

The *Barclays* Court emphasized that the Constitution vests Congress, not the President, with power to regulate

[12] According to the grant of certiorari, this Court agreed to review whether the state law "intrude[s] into an inherently federal area and is [thus] preempted by [the] United States Constitution" as well as whether the state law violated the dormant Commerce Clause. 62 U.S.L.W. 3042 (1993). In briefing the case, Barclays cited *Zschernig* with approval and argued: "Where state legislation or action interferes with the conduct of foreign affairs by the Federal Government, the Constitution itself preempts it." See Brief for Petitioner at 42, *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994) (No. 92-1384).

foreign commerce, and thus it is for "Congress – whose voice, in this area, is the Nation's – to evaluate whether the national interest is best served by [national] uniformity, or state autonomy." 512 U.S. at 331. "Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional a state's otherwise valid congressionally condoned" statute. *Id.* at 330. Accordingly, so long as a state law is not discriminatory against out-of-state companies and does not otherwise violate the usual Commerce Clause analysis, the question is whether Congress disapproves of the law. *Id.*

In *Barclays*, this Court found that Congress was aware of the California law and of the international and Executive Branch objections to it. The Executive Branch, under pressure from foreign governments, asked Congress to override the California statute, but Congress did not. This Court concluded that where Congress had declined to take preemptive action, it was not for the Court (or the Executive Branch) to say that the state law was invalid, even where it had substantial "foreign affairs" effects. *Id.* at 324-331. In particular, this Court observed that "Congress may more passively indicate that certain state practices do *not* impair federal uniformity in an area where federal uniformity is essential." *Id.* at 323 (emphasis in original). Accordingly, this Court looked for "specific indications of congressional intent to bar the state action here challenged." *Id.* at 324 (internal quotation marks omitted). See also *Wardair*, 477 U.S. at 12-13 (declining to invalidate state tax with substantial international effects in the absence of congressional disapproval).

This case is essentially identical to *Barclays*. Like *Barclays*, it involves a state commercial regulation that may adversely affect foreign private companies, and that has been protested by foreign governments and the Executive Branch. Like *Barclays*, the HVIRA does not criticize any foreign government. Also as in *Barclays*, Congress is well aware of the HVIRA (and the objections to it lodged by foreign governments and the Executive Branch). Yet,

with this knowledge, Congress has not acted to preempt the HVIRA, and has at least implicitly approved it.

Barclays stands squarely against petitioners' broad reading of *Zschernig*. Petitioners cannot explain how the law upheld in *Barclays* could be constitutional under their theory of "foreign relations preemption." In contrast, if *Zschernig* applies only to state criticisms of foreign *governments*, rather than state commercial regulation of private businesses that affect foreign governments at most indirectly, then *Barclays* and *Zschernig* are easily reconciled.

In short, an attempt to turn *Zschernig* into a warrant for courts to police state economic regulations for undue international effects was rejected in *Barclays* and should be rejected here. As in *Barclays* and related cases, claims against state commercial regulations such as the HVIRA should be analyzed under the dormant Foreign Commerce Clause, not under *Zschernig*.

4. Congress Has Approved State Activity Like The HVIRA.

As the court below found, Congress has implicitly approved state legislation in the area of Holocaust-era insurance policies. First, the McCarran-Ferguson Act establishes that regulation of insurance should be a matter for the states (except when Congress itself specifically intervenes). In passing the Act, Congress determined that national uniformity in insurance regulation was not required. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946). Further, on the particular issue of Holocaust-era insurance, Congress has been made aware of the HVIRA and of Executive Branch and foreign government opposition to it, and yet has made no attempt to intervene.

Indeed, as the court below found, in passing the HCA, "Congress has spoken affirmatively in the area of Holocaust-era insurance policies and has acquiesced in state laws like HVIRA." App. 47a. In encouraging state insurance regulators to prepare a report on the Holocaust-related claims practices of both foreign and domestic insurance companies, and in fulfilling the HCA's "broad

objectives," "Congress must have expected that the regulators would be acting pursuant to state law" and "might have to require the foreign affiliates of domestic insurance companies to search a foreign office for information on Holocaust-era policies." App. 49a. Thus, the HCA and its legislative history show that "Congress was aware of the states' efforts to obtain information on Holocaust-era insurance policies" and "encouraged laws like HVIRA." App. 49a, 50a. Even if the HVIRA otherwise would be subject to "dormant" foreign relations preemption, Congress has acted to overcome the preemption.

5. Federal Government Authority To Resolve "War Claims" Does Not Provide A Basis For Preempting State Commercial Regulations Like The HVIRA.

Petitioners (AIA Brief at 24-25) and the United States (Brief at 11, 16) suggest that the national government has the exclusive authority to resolve claims arising out of international conflicts, and that this "dormant" power invalidates the HVIRA. Even assuming the federal government has exclusive power to resolve "war claims," the HVIRA is still valid.

First, the HVIRA is a commercial reporting statute that does not *resolve* any claims. It instead addresses the persistent and current refusal of insurance companies to disclose basic policyholder information. See *Deutsch v. Turner Corp., reprinted as amended at* 2003 U.S. App. LEXIS 3937 (9th Cir. Cal. Jan. 21, 2003) (finding the HVIRA does not implicate the federal government's exclusive power to make and resolve war).

Second, claims that Holocaust survivors may have against private insurance companies are not "war claims," in the sense that would suggest any exclusive federal authority arising out of the federal government's power to make and resolve war. Instead, they are purely private contractual claims between insurance policyholders and private insurers. They do not involve any claim against any government or any agent of any government. Cf. *Deutsch*, 2003 U.S. App. LEXIS 3937. Some, but not all, of

the Holocaust insurance claims arose during wartime, but in any event, state law has routinely been applied to private contractual disputes (including insurance disputes) arising during wartime, without any suggestion of an exclusive federal power. See, e.g., *N.Y. Life Ins. Co. v. Bennion*, 158 F.2d 260 (10th Cir. 1946). The HVIRA, which is only a reporting statute that does not purport to resolve claims, is even further from any exclusive federal power over war claims.[13]

Finally, the case petitioners and the United States cite for such authority, *Dames & Moore v. Regan,* involved an *expressly preemptive* executive agreement that, with the acquiescence of Congress, settled claims against a foreign *government*. 453 U.S. 654, 679 (1981). The executive agreements here are expressly *non-preemptive,* and any claims implicated by this case are ones against private insurance companies.

C. The HVIRA Is Not Preempted By Any Activity Of The Executive Branch.

Although petitioners purport to assert a *dormant* foreign affairs preemption over state insurance statutes, in reality their arguments are substantially based on the Executive Branch's activity in the field of Holocaust-era claims, including the executive agreements with Germany

[13] The United States has not considered war claims to include private contractual claims under insurance policies. In 1948, Congress created a Commission to resolve "war claims." 50 U.S.C. app. §§ 2001 *et seq*. The Commission issued a definition of "war claims" that was limited to claims against foreign governments for property damage suffered as a consequence of operations of war, lawless acts accompanying the collapse of civil authority and measures directed against a claimant because of his enemy character. See *Supplementary Report Of The War Claims Comm'n On War Claims Arising Out Of World War II*, H.R. Doc. No. 83-67, at 115 (1953); *Hearings Before Subcomm. Of The Comm. On Interstate And Foreign Commerce On Bills To Amend The War Claims Act And The Trading With The Enemy Act*, 86th Cong. 3 (1959).

and Austria, the Executive Branch's endorsement of ICHEIC, and the "hortatory" (App. 54a-55a) Swiss-U.S. Joint Statement. AIA Brief at 3-8. Those activities are not preemptive of state insurance regulations like the HVIRA.

1. The Executive Agreements Are Not Preemptive.

The executive agreements on which petitioners rely "do not, of their own force, extinguish any claims that Holocaust victims or their families might assert in court against foreign insurance companies." United States Brief at 17. The federal government has not undertaken a duty or made any promise to achieve legal peace for foreign insurance companies against state litigation or regulatory action, including the HVIRA. Resp. App. 47-48, 51-52 n.7. This view is confirmed by the agreements themselves, whose language is "hortatory rather than mandatory." *Trojan Techs.,* 916 F.2d at 906. See also *Wardair,* 477 U.S. at 10 (distinguishing between statements of "international *aspiration*" and "the *law* as it presently stands.") (emphasis in original).[14]

In light of these admissions and the plain language of the agreements, petitioners cannot reasonably assert that the agreements preempt the HVIRA. Petitioners nevertheless rely on several cases that find executive agreements to be preemptive, and suggest that the executive agreements here make "application of the foreign affairs power more compelling." AIA Brief at 28. But the agreements in those cases each involved special circumstances not present here, justifying only a limited preemptive force.

[14] Use of the judiciary to give preemptive status to an expressly nonpreemptive executive agreement permits the Executive Branch to nullify state regulatory power without accepting clear political responsibility. This Court has previously protected state power against federal incursion based in part on the recognition that public officials sometimes prefer blurred lines of political responsibility. *New York v. United States*, 505 U.S. 144, 182-183 (1992).

Those cases also reflect this Court's concern about not expanding presidential lawmaking.

In *Dames & Moore*, for example, an expressly preemptive executive agreement disposed of claims against a foreign government as part of the resolution of a foreign policy crisis. 453 U.S. at 663-665. This Court emphasized the historical practice of (and Congressional acquiescence in) presidential settlement of claims against foreign nations, and also found that, by an earlier statute, Congress had implicitly authorized the President to settle claims against foreign nations by executive agreement. *Id.* at 679-680. This Court also relied on other federal statutes that delegated broad authority to the President to act "in times of national emergency with respect to property of a foreign country" and gave the President broad discretion "when responding to hostile acts of foreign sovereigns." *Id.* at 677. The Court "re-emphasize[d] the narrowness of [its] decision," stating that "[w]e do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities." *Id.* at 688.[15]

2. Executive Branch Diplomacy Does Not Preempt State Regulation Authorized By Congress.

Petitioners' argument seems to be that, because the Executive Branch has been involved in some aspects of negotiating and settling some Holocaust-era insurance claims, any state law that implicates any of those claims is invalid. Petitioners cite absolutely no authority for this claim, and there is none. No state law has ever been

[15] The only other cases giving preemptive effect to an executive agreement also turned on unique circumstances not present here. See *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937) (giving preemptive effect to agreement recognizing the government of the Soviet Union, emphasizing the President's power to recognize foreign governments under Article II, Section 3 of the Constitution).

declared invalid simply because it happened to regulate a matter that was also the subject of Executive Branch diplomacy efforts.[16] Foreign commerce, moreover, is an area specifically entrusted to Congress by the Constitution.

Petitioners' claims of presidential "field preemption" are also rejected by *Barclays*. The petitioners in *Barclays* heavily relied on the views of the Executive Branch in their unsuccessful bid to overturn the state law in that case. This Court rejected their argument, observing that "[t]he Constitution expressly grants Congress, not the President, the power to 'regulate Commerce with foreign nations,'" 512 U.S. at 329 (quoting Article I, Section 8). Thus, "[the President] 'is better able to decide than we are which state regulatory interests should currently be subordinated to our national interest in foreign commerce. Under the Constitution, however, neither he nor we were to make that decision, but only Congress.'" *Id.* (quoting *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60, 81 (1993) (Scalia, J., concurring in the judgment)). *Barclays* squarely held that "Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned" activity. *Id.* at 330.

II. THE HVIRA DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE

The Court of Appeals followed fifty years of precedent holding that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, insulates state insurance regulations from

[16] Petitioners' argument is extraordinarily broad, claiming that Executive Branch activity with respect to *some* Holocaust-era claims precludes state regulation relating to *any* Holocaust-era claims, even ones not involved in the Executive Branch negotiations, such as those against Generali.

Significantly, the United States does not go this far, explaining to this Court that its foreign policy arguments apply only to companies "subject to the agreements" – which does not include all petitioners. United States Brief at 17.

all Commerce Clause restrictions, even if the regulations affect extraterritorial conduct. App. 40a-45a. But even if McCarran did not apply, the HVIRA does not violate the Commerce Clause.

A. Both The Plain Language Of McCarran-Ferguson And Fifty Years Of Precedent Establish That State Insurance Regulations Are Exempt From *All* Commerce Clause Restrictions.

The first section of the McCarran-Ferguson Act provides:

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose *any barrier* to the regulation or taxation of such business by the several States.

15 U.S.C. § 1011 (emphasis added). Consistent with this declaration of legislative purpose, Section 1012(a) provides: "The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business."

The primary purpose of the Act was to shield from Commerce Clause attack regulations that might affect interstate commerce following the decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). See *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 217-220 & n.18 (1979). Consistent with this purpose and the statute's plain language, this Court has held that the McCarran-Ferguson Act insulates state insurance regulations from *all* Commerce Clause attack, even where the regulation has extraterritorial effects. *Western & So. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652-653, 669-671 (1981); *Benjamin*, 328 U.S. at 429, 431. In *Western & Southern*, for example, California imposed a retaliatory tax on foreign insurers to pressure other states to lower taxes on California insurers.

Although the statute was both discriminatory and extraterritorial, this Court upheld it against a Commerce Clause challenge.[17]

B. The Court Of Appeals' Decision Is Consistent With This Court's Decision In *Travelers*.

Relying primarily on *FTC v. Travelers Health Ass'n*, 362 U.S. 293 (1960), petitioners contend that a broad "extraterritorial" exception to the McCarran-Ferguson Act exists. Petitioners mischaracterize *Travelers*. *Travelers* did not involve a Commerce Clause challenge, and instead addressed a totally distinct part of the McCarran-Ferguson Act. App. at 41a-42a.

In addition to exempting state insurance regulations from all Commerce Clause attack, the Act also gives state insurance regulations a more limited exemption from federal statutory preemption. Section 1012(b) provides in part: "No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." Section 1012(b) also provides that the federal antitrust statutes and the Federal Trade Commission Act do apply to the "business of insurance," but only "to the extent that such business is not regulated by state law."

Travelers involved only an interpretation of McCarran-Ferguson's narrow exemption from the Federal Trade Commission Act for the business of insurance. The issue was whether the FTC could regulate interstate insurance sales under Section 1012(b) of the Act. The FTC sought to enjoin deceptive advertising by a Nebraska company that sold insurance nationwide. To evade federal regulation,

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[17] See also *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985); *Group Life & Health Ins. Co.*, 440 U.S. at 219 n.18; *State Bd. of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451, 452-457 (1962). See generally *New York v. United States*, 505 U.S. at 171 (recognizing Congress' power to permit states to burden interstate commerce).

the insurer argued that the FTC lacked jurisdiction because a Nebraska statute already prohibited Nebraska insurance companies from engaging in deceptive trade practice "in any other state." *Travelers*, 362 U.S. at 296.

This Court disagreed, holding that the McCarran-Ferguson Act permitted the FTC to act. This Court reasoned that Congress did not intend to allow a single state's law to displace the FTC's ability to protect residents of other states. *Id.* at 297-298. Otherwise, the purpose of Section 1012(b) would be subverted: If one state had a fair trade statute that purported to regulate nationwide, an insurer located there would be free from the reach of the FTC Act in every other state. *Id.* at 301-302. To avoid this result, this Court held that the "state regulation" that could displace the FTC Act under Section 1012(b) meant "regulation by the state in which the deception is practiced and has its impact," *id.* at 298, or "where the business activities have their operative force." *Id.* at 301-302. However, this has nothing to do with Congress' direction that state insurance regulation be insulated "from *any* attack under the commerce clause." *Benjamin*, 328 U.S. at 431 (emphasis added).

Petitioners' argument that *Travelers*' "extraterritoriality exception" to Section 1012(b)'s preemption exemption should also apply to the state's Commerce Clause immunity under Section 1012(a) is based mainly on similarity in the language of the two provisions. AIA Brief at 41. But the argument is inconsistent with other language in the Act, namely, its Declaration of Policy in Section 1011, which provides that "silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation" of the business of insurance.

According to petitioners, the HVIRA's claimed extraterritoriality not only excepts it from the Act's protection against Commerce Clause attack but is also a reason that the HVIRA violates the Commerce Clause. Since, for Commerce Clause purposes, Congress could consent to state HVIRA-type disclosure requirements, petitioners' Commerce Clause claim is obviously

predicated on the absence of such express consent – that is, on Congressional silence. For petitioners' argument to prevail, Section 1011 must be read to permit an extraterritoriality exception that not only is not in the text, but also is belied by Section 1011's clear preclusion of Congressional silence as the basis of "any barrier" to state regulation. The *Travelers* Court's interpretation of Section 1012(b)'s express preemption exemption did not face this textual obstacle because it did not implicate Section 1011's Declaration of Policy regarding the Commerce Clause.

Petitioners attempt to buttress their argument by citing legislative history of the Act, relied on by the *Travelers* majority, showing that Congress did not intend to overturn three pre-McCarran decisions of this Court which held that the Due Process Clause limits extraterritorial state insurance taxation and regulation. AIA Brief at 42. However, the determination in *Travelers* that the Act's legislative history supported an extraterritoriality exception to Section 1012(b) obviously does not signify that the legislative history is also an adequate basis for defeating the plain language of Section 1011 and fifty years of precedent holding that the Act insulates state insurance regulation from *all* Commerce Clause restrictions. In fact, this Court has acknowledged the different purposes of the Act's broad Commerce Clause immunity and the limited statutory exemption of Section 1012(b):

> The McCarran-Ferguson Act operates to assure that the States are free to regulate insurance companies without fear of Commerce Clause attack. The question in the present case, however, is one under the quite different secondary purpose of the McCarran-Ferguson Act – to give insurance companies only a limited exemption from the antitrust laws.

Group Life & Health Ins., 440 U.S. at 219 n.18.

Interpreting Section 1011 to mean what it plainly says does not disregard the legislative history on which petitioners rely. Instead, it shows Congress' understanding that the Act did not purport to eliminate due process limits

on state legislative jurisdiction, a premise the Commissioner has never disputed.

C. The HVIRA Is Constitutional Even If It Is Subject To Commerce Clause Restrictions.

1. The HVIRA Does Not Regulate Extraterritorially.

Even if the McCarran-Ferguson Act does not shield the HVIRA from Commerce Clause attack, the statute is constitutional because it is not an extraterritorial law. The HVIRA is a California regulation of California insurance companies. App. 45a. It is not discriminatory and is not protectionist or anti-competitive in purpose or effect. It applies to all insurers doing business in California, foreign or domestic. It does not affect the manner in which any of the regulated companies or their affiliates do business outside California.

Its only effect outside the state is informational; that is, it requires the reporting of historical information about foreign insurance policies. It does not even require out-of-state insurers to gather and compile the information, since, as far as the statute is concerned, performance of those tasks might be assumed by the California companies whose licenses are at issue.

Petitioners' extraterritorial regulation argument relies upon three decisions of this Court: *Edgar v. MITE Corp.*, 457 U.S. 624 (1982); *Healy v. Beer Institute*, 491 U.S. 324 (1989); and *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986). In *Edgar*, 457 U.S. at 644-647, the Court held that an Illinois statute restricting business takeovers violated the Commerce Clause because the burden on interstate commerce exceeded its local benefits, a theory petitioners cannot seriously advance here. A plurality in *Edgar* also believed the statute was an extraterritorial regulation, but the plurality expressly approved this Court's holding in *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917), that a state blue sky law requirement that companies report on out-of-state matters as a condition of state licensing does not violate the dormant Commerce

Clause, since "[s]uch regulations affect interstate commerce only incidentally." *Edgar*, 457 U.S. at 641 (quoting *Hall*, 242 U.S. at 557-558). The HVIRA's reporting requirement is also a condition of licensing, *i.e.*, of doing business within the state, and its out-of-state informational effect, identical to that approved in *Hall* and by the plurality in *Edgar*, is also an incidental effect.

The *Healy* and *Brown-Forman* decisions do not aid petitioners' argument either. These cases involved challenges to actions by Connecticut and New York, respectively, that required beer (*Healy*) and liquor (*Brown-Forman*) producers to affirm that prices charged in-state for their products were no higher than prices charged in other states. This Court found these regulations directly affected the prices the companies could charge in other states, and on this basis held the statutes unconstitutional under the dormant Commerce Clause, in part on an "extraterritorial regulation" theory. Thus, *Healy* and *Brown-Forman* do not condemn "extraterritorial regulation" in the abstract, but rather a particular kind of extraterritorial effect on pricing in interstate competitive markets that lies at the core of that which the dormant Commerce Clause seeks to prevent. No such issue is presented here.

The HVIRA has a significantly smaller effect on out-of-state conduct than a great many state regulations that have always been assumed to be consistent with the Commerce Clause, such as state automobile safety or emissions requirements that require out-of-state manufacturers to modify production in order to sell in the regulating state. Neither evidence nor common sense suggests that the HVIRA's reporting requirement will interfere with insurance pricing or any other aspect of the sale of insurance in foreign or interstate markets.

2. The Court Of Appeals' Decision Is Consistent With This Court's Decisions Construing The Foreign Commerce Clause.

Petitioners argue that the HVIRA violates the Foreign Commerce Clause because it purportedly "precludes the

federal government from speaking with 'one voice' in its commercial relations with foreign governments." AIA Brief at 33. As discussed above, the HVIRA is no more constitutionally suspect than the statute upheld in *Barclays*, which regulated private business, had been protested more vigorously by foreign governments, and had received less support from Congress than has the HVIRA.

III. THE HVIRA IS WITHIN CALIFORNIA'S LEGISLATIVE JURISDICTION

Both the District Court and the Court of Appeals held that California had legislative jurisdiction to enact the HVIRA. App. at 72a-75a; App. at 8a-20a. Petitioners' contention that the state lacks legislative jurisdiction (1) mischaracterizes the HVIRA; (2) improperly relies on what petitioners erroneously assert is the statute's "actual purpose"; (3) ignores the regulatory purposes reflected in the HVIRA and the state interests it serves; (4) is based on a plainly distinguishable Eleventh Circuit decision; and (5) would undermine fundamental and commonly used disclosure laws necessary for states to regulate multi-jurisdictional business associations.

Contrary to petitioners' assertions, the HVIRA regulates *only* insurance companies that do business in California. App. at 9a. It does this by requiring as a condition of their doing business that they report information concerning Holocaust-era policies written by them or their affiliates. It does *not* require insurers to pay any claims, does *not* alter the terms of any policies, and does *not* in any other way regulate the substance of out-of-state transactions. App. at 9a, 15a, 16a, 43a-45a.

A. The Court Of Appeals Correctly Held That California Has Legislative Jurisdiction To Require Licensees To Disclose Information Relevant To State Interests.

Legislative jurisdiction attacks on regulations of companies that do business in the regulating state are rare, since the minimum contacts requirement for legislative jurisdiction is obviously satisfied in such cases because the

regulated companies do business in the state, and the only remaining due process question is whether the regulation rationally serves a legitimate state interest. Nevertheless, petitioners argue that requiring in-state companies to report on out-of-state conduct is beyond the state's legislative jurisdiction because that *conduct* lacks minimum contacts with the state. But a state seeking information relevant to a licensing decision need not have minimum contacts with the *conduct* about which information is sought (as opposed to contacts with the regulated company). A state may well have legitimate regulatory interests in out-of-state conduct of out-of-state parents or affiliates of licensees.

Decisions applying the minimum contacts requirement have involved either the regulation of out-of-state entities, the application of substantive forum law or the raising of tax revenue based on foreign transactions. App. at 11a-20a. The Court of Appeals ruled that the HVIRA regulates neither foreign insurance companies nor the substance of foreign insurance transactions, "because it does nothing more than seek information from California-licensed insurers." App. at 20a. The court held that the Commissioner need not prove "that minimum contacts exist between California, [petitioners'] foreign affiliates, and the insurance policies issued by them," App. at 20a, noting that a contrary ruling would invalidate many existing reporting statutes that require multinational insurers and other financial institutions "to disclose foreign activities and transactions engaged in by them and their parent and affiliate companies." *Id.* Implicit in this ruling is that the business presence of the regulated insurers in California is a sufficient contact to justify legislative jurisdiction, and that all that remained were substantive due process questions controlled by the rational basis test.

The Court of Appeals thereafter upheld the HVIRA against substantive due process attack, holding that the rational basis test controlled and was satisfied because the statute is rationally related to both victim and consumer protection interests: (1) providing California Holocaust

survivors information on the basis of which they may decide whether to pursue claims in whatever fora they choose, including ICHEIC; (2) protecting California residents from untrustworthy insurance companies that "have a history of . . . refusing to inform potential beneficiaries about policy proceeds to which they may be entitled"; and (3) providing California residents information concerning the families of insurers from which they are contemplating buying insurance. App. 16a, 22a, 23a, 25a.[18]

B. Petitioners Mischaracterize The HVIRA's Purposes. But In Any Event, California's Legislative Jurisdiction Under Either Rational Basis Or Minimum Contacts Analysis Turns On Whether California Has Legitimate Interests That Justify The Statute.

Recognizing the overreaching character of their attack on any required reporting of foreign matters, petitioners appear to rely mainly on a second argument that the HVIRA is not "really" a consumer protection statute. According to this argument, it is irrelevant to California's legislative jurisdiction that all of the regulated companies do business in California and that California has legitimate consumer protection interests that are rationally served by the statute, because consumer protection is not really the "purpose" of the statute. Instead, petitioners say that the purpose of the HVIRA is to foster litigation in California courts that would compel payment on foreign transactions. AIA Brief at 9, 11, 19, 49.

The HVIRA does not require the reporting of information for the purpose of encouraging litigation in California courts or any other court. But even if petitioners' description of the statute's "actual purpose" were correct, due

[18] In California, insurers are fiduciaries that have broad obligations of good faith and fair dealing. *Egan v. Mutual of Omaha Ins. Co.*, 620 P.2d 141, 146 (Cal. 1979).

process analysis of economic regulations does not turn on actual purposes. Instead, either of two substantially similar methods of constitutional analysis control the constitutionality under the Due Process Clause of state regulation of companies that do business in the state.

First, doing business in the state is a sufficient contact for legislative jurisdiction in regulatory matters, without more, and the only remaining substantive due process question is whether the regulation satisfies the rational basis test. This is the analysis suggested by the seminal modern decision dealing with both equal protection and due process limits on state power to condition insurance company licenses, *Western & Southern Life Insurance Co. v. State Board of Equalization*. That case holds that such regulation passes constitutional muster under the Due Process Clause so long as it satisfies the rational basis test, even if there are substantial extraterritorial regulatory effects. 451 U.S. at 671.

Second, as suggested by legislative jurisdiction decisions, minimum contacts analysis requires that the state show that the company's business presence in the state, combined with the state's substantial Holocaust population, creates "state interests, such that the choice of its law is neither arbitrary nor fundamentally unfair." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-313 (1981)).

These two analyses are substantially similar because (1) both have their basis in the Due Process Clause; (2) both seek to assure fundamental fairness; and (3) toward this end, both turn on whether the regulating state has legitimate "interests" that justify the regulation. What is important under both analyses are justifying state interests, not motivating legislative purpose. The HVIRA is constitutional under either analysis. The statute serves both victim and consumer protection interests, and these interests are more than sufficient to satisfy both the rational basis and the minimum contacts tests.

1. The HVIRA Was Adopted For Both Victim And Consumer Protection Purposes.

While acknowledging that the HVIRA's "main purpose" was victim protection, the court below found that it was "likely" that the legislature also had consumer protection purposes that were at least a first step in addressing a serious problem perceived by the state. App. at 16a, 22a-25a, 44a, 53a. See *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 316 (1993). This finding was based on common sense, and on statutory structure and language.

Petitioner's argument that the statute's sole purpose is to facilitate claims payment is based mainly on two California statutes that were enacted separately from and prior to the HVIRA: California Code of Civil Procedure Section 354.5 and Insurance Code Section 790.15. Both the District Court and the Court of Appeals rejected petitioners' attempts to conflate the HVIRA with these other statutes. App. at 6a, 7a, 10a, 16a, 17a, 38a, 43a, 86a, 87a.[19]

The HVIRA is a reporting statute that addresses the problem of insurer stonewalling; that is, the unconscionable, continuing, persistent and present refusal by insurance companies to disclose critical information upon inquiry by possible policyholders who themselves lack the information. The California legislature expressly found that in many instances, insurance company records are the only remaining proof of insurance. Cal. Ins. Code § 13801(c). The legislature also determined that companies doing business in the state "have a responsibility to ensure that any involvement they or their related companies may have had with insurance policies of Holocaust victims are disclosed to the state" and that the HVIRA was "necessary to protect the claims *and interests of California residents.*" *Id.* § 13801(e), (f) (emphasis added).

[19] The constitutionality of the HVIRA should be assessed on its own merits and without regard to other statutes that are not before the Court. *Elec. Bond & Share Co. v. SEC*, 303 U.S. 419, 434-437 (1938).

These provisions are legislative findings that California insurers that refuse to provide essential information to policyholders and beneficiaries are not satisfying their responsibilities, and they carry the obvious implication that such insurers and their family of companies are not fit to do business in the state. Particlar deference to the legislature's judgment is warranted where, as here, the business being regulated is insurance. *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220, 224 n.4 (1949).

Petitioners' argument that the HVIRA's purpose was to foster victim but not consumer protection implicitly rests on the improbable assumption that these are unrelated or even inconsistent purposes, and therefore the legislature must have been pursuing only one or the other. The victim and consumer protection purposes at issue here are related and complementary: There is every reason in common sense and experience to believe that a legislature that thought insurer stonewalling improperly impeded victims' rights would also believe that continued stonewalling raised serious questions about the insurers' fitness to do business in the state.[20] In fact, it is difficult to imagine that a legislature that wanted to protect victims from such conduct would not also have wanted to protect consumers more generally from families of insurance companies that engage in stonewalling of policyholders and beneficiaries. See Cal. Ins. Code § 13801(f) (finding that the HVIRA is "necessary to protect the claims and interests of California residents"). The Court of Appeals

[20] The state has a statutory duty to consider the competency, character and integrity of the management of its insurance licensees and the fairness and honesty of their methods of doing business. Cal. Ins. Code § 717. Those inquiries include examination of the conduct of the licensee's parent and affiliates. E.g., Cal. Ins. Code §§ 1215.2(d)(5), 1215.4(g) and 1215.6.

therefore correctly found that both were "likely" purposes.[21]

This Court has recognized the difficulty of determining legislative purpose or motive for constitutional purposes, and for this and other reasons has generally refused to engage in such inquiries. In a case such as this where the disputed purposes are clearly and strongly related and complementary, the Court should either hold that the presumption of constitutionality accorded all legislation requires a finding that both were purposes or should refuse to engage in the inquiry.

2. Minimum Contacts Analysis Depends On Justifying Interests, Not Motivating Purposes.

The language and method of analysis in legislative jurisdiction decisions involving limits on both state choice of law and taxation make clear that what is important is state justifying interests, not motivating purposes. In *Shutts*, this Court explained that the point of the inquiry into "contacts" in the choice of law setting is to determine whether the contacts create "state interests, such that choice of its [forum state] law is neither arbitrary nor fundamentally unfair." 472 U.S. at 818 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. at 312-313). See also *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 316-317 (1943). The minimum contacts test, in other words, tests for justification, not for motivating purposes. See, e.g., *Allstate*, 449 U.S. at 315, 319 (contacts with Minnesota created state interests justifying "stacking" of uninsured motor vehicle coverage even in absence of legislative purpose to protect those interests).

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[21] Members of Congress have characterized disclosure laws like the HVIRA as "consumer protection legislation," intended to protect consumers against companies with bad business practices. See *2000 Hearing* at 160-162 (Statement of Congressman Sherman).

Minimum contacts analysis is also a test for justifying interests in taxation settings. In *ASARCO, Inc. v. Idaho State Tax Comm'n*, for example, this Court described the basic question as follows:

> "whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return."

458 U.S. 307, 315 (1982) (quoting *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1990)).

In *J.C. Penney*, the Court held the tax constitutional because the state had granted the taxpayer the privilege of doing business in the state. The key point was that this contact gave the state a legitimate interest in the tax, not that the state's purpose in enacting the tax was to exact compensation for granting the privilege. To the contrary, the Court described Wisconsin's legislative purpose simply as raising revenue in a manner consistent with the State's taxing system in order "to meet the increasing demands of the depression years." 311 U.S. at 442.

C. Making The Minimum Contacts Test Dependent On Purposes Rather Than Interests Would Be Inconsistent With The Principles That Underlie Substantive Due Process Jurisprudence And With The Concept Of Fundamental Fairness That Underlies The Minimum Contacts Test.

The substantive constitutionality of economic legislation under the Due Process Clause depends on an analysis (the rational basis test) based on justifying interests, not motive or purpose. *Daniel*, 336 U.S. at 222-224. Cf. *FCC v. Beach Communications*, 508 U.S. at 315; *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 875 n.5 (1985). Under the rational basis test, a court must consider *all* conceivable state interests served by the legislation, regardless of whether they were expressed in the legislation or actually motivated the legislature. E.g., *Beach Communications*,

508 U.S. at 315. All of the reasons why this Court has evolved the rational basis test in this manner are equally applicable to the test for legislative jurisdiction. Moreover, injection into minimum contacts analysis of a "real purpose" issue is inconsistent with the concept of fundamental fairness that underlies the test.

1. The Reasons That Inquiries Into Actual Purpose Are Excluded From Substantive Due Process Law Are Equally Applicable In The Legislative Jurisdiction Context.

The watershed case for modern substantive due process law was *United States v. Carolene Products Co.*, where this Court announced that because of the deference courts owe legislative decisionmaking, substantive due process review of legislation "must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it." 304 U.S. 144, 154 (1938). There is no apparent reason why the same deference is not appropriate in the subspecies of substantive due process law relating to legislative jurisdiction, and petitioners have mentioned none.

Substantive due process law's focus on interests rather than purpose is based not only on the principle of deference, but also on three problems that would result if purpose were determinative. Two of these problems were discussed in *United States v. O'Brien*, a leading decision holding that legislative purpose or motive is normally irrelevant to a statute's constitutionality. 391 U.S. 367, 382-385 (1968). There, this Court refused to invalidate, on the ground that Congress had a speech-repressive purpose, a statutory prohibition on draft card destruction, citing both the difficulty of accurately determining legislative purpose and the "repassage problem," *i.e.*, that the same statute "could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." *Id.* at 384. The third problem, not present in *O'Brien*, is that if purpose were constitutionally determinative,

identical statutes in different states might meet different fates, depending on differences in legislative purpose.

All three of these problems are equally troublesome in the legislative jurisdiction context. Thus:

(1) Petitioners claim the HVIRA has no consumer protection purpose, despite statutory text suggesting otherwise and the fact that the victim and consumer protection purposes are so highly complementary as to suggest both were likely purposes;

(2) The Court of Appeals found that the HVIRA satisfies the rational basis test. App. at 22a-27a. The statute therefore could be constitutionally reenacted if the legislature made even clearer that it was also concerned about protecting consumers from families of insurers that engage in stonewalling; and

(3) The Eleventh Circuit held Florida's Holocaust statute unconstitutional because it found that the statute did not have a consumer protection purpose (conceding the outcome might well be different if it had such a purpose), whereas California's statute would be constitutional if this Court determined it had such a purpose.[22]

2. Purpose Analysis Is Inconsistent With The Concept Of Fundamental Fairness That Underlies The Minimum Contacts Test.

Invalidating the HVIRA on the basis of its purpose would also be inconsistent with the concept of fundamental fairness that underlies minimum contacts analysis. A key element of fairness is the insurers' *legitimate* expectations. *Shutts*, 472 U.S. at 822; *id.* at 837-838 (Stevens, J., concurring in part and dissenting in part). In legislative

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[22] The Court of Appeals correctly held that *Gerling Global Reinsurance Corp. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001), is distinguishable from the present case on various factual grounds. App. 9a-11a. In any event, to the extent that the *Gallagher* court relied on what it believed was the "express purpose" of the Florida statute, that analysis was flawed.

jurisdiction contract law decisions, the expectation interest that this Court protects is the interest against surprise as to which state's substantive law will govern contractual rights. *Id.*

The HVIRA does not frustrate insurer expectations based on either (1) the provisions in the underlying insurance contracts, or (2) the substantive law that will govern contractual obligations. This is because there is no evidence that any of the insurance policies have provisions that preclude the reporting of information, and the HVIRA does not alter any contractual terms. Insurance companies, moreover, have no legitimate expectations that a jurisdiction will not change its regulatory laws relating to insurance consumer protection. To the contrary, since insurance is a highly regulated industry, "further regulation can reasonably be anticipated." *Calfarm Ins. Co. v. Deukmejian*, 771 P.2d 1247, 1262 (Cal. 1989). See also Cal. Ins. Code § 700(c). Presumably, if the HVIRA had been enacted with an expressly declared consumer protection purpose, it would be within California's legislative jurisdiction. If that law would not frustrate any legitimate expectations, then neither can the HVIRA.

D. Petitioners' Business Presence And The Residence Of Thousands Of Holocaust Victims In The State Are Sufficient To Satisfy The Minimum Contacts Test.

If the minimum contacts test controls, there are sufficient contacts with California to satisfy that test. *Allstate* expressly recognized that an insurance company's doing business in the state gave the state a regulatory interest in protecting state residents. 449 U.S. at 318. The fact that the regulated insurers here all do business in California is a contact sufficient to generate state consumer protection interests served by the HVIRA.

Petitioners' business presence is not the only relevant contact with the state. California is also home to thousands of elderly Holocaust survivors, many of whom live in poverty. Jnt. App. 29-30; Resp. App. 24. California has a legitimate interest in protecting these victims of insurer

stonewalling, to keep them off the welfare rolls and able to meet financial obligations. *Allstate*, 449 U.S. at 314, 315, 319; *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66, 72 (1954); *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532, 542 (1935).

Petitioners assert that "a party's post-transaction change of residence does not justify a forum state's exercise of legislative jurisdiction over a foreign transaction." AIA Brief at 46. Putting aside the fact that California is not exercising jurisdiction over foreign transactions, petitioners' argument is overstated and misplaced. This Court has held that a victim's post-transaction change of residence to a forum state is a relevant state interest that can help support legislative jurisdiction if it is clear, as it is here, that the residence change was "unrelated and prior to the litigation," *Shutts*, 472 U.S. at 820; *Allstate*, 449 U.S. at 318-319. There is simply no reason to disqualify victim-residence as a relevant contact in this case where (1) Holocaust survivors did not move to California after World War II for forum shopping purposes, and (2) the insurance policies contemplate worldwide coverage.[23]

Moreover, to the extent that the post-transaction change of residence rule serves a purpose in addition to preventing forum shopping, that purpose is to mandate that a victim's residence in a forum state carry little justificatory weight as against the defeat of expectations entailed by settling a contract dispute under an unexpected jurisdiction's substantive contract law. The HVIRA does not purport to change contract rights, and more importantly, does not defeat any *legitimate* expectations.

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[23] In addition, a number of the insurance policies at issue here contemplated that the policyholder might change his or her domicile outside of Europe and did not restrict the location where benefits were payable. Jnt. App. 77, 82. See also *Kaplan v. Assicurazioni Generali*, 34 N.Y.S.2d 115 (1942). Indeed, European insurers were aware, even before World War II, that a number of their policyholders had emigrated to places outside Europe, including California. 1-ER 904-1009.

In sum, the combination of petitioners' business presence in California, generating consumer protection interests, and the residence of thousands of Holocaust victims in the state, generating victim protection interests, establishes contacts between the HVIRA's reporting requirement and the state that are more than sufficient to sustain California's legislative jurisdiction.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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AMERICAN INSURANCE ASSOCIATION, AMERICAN RE-INSURANCE COMPANY, *ET AL.*,

Petitioners,

v.

JOHN GARAMENDI, IN HIS CAPACITY AS COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR THE PETITIONERS

The Commissioner's brief is a study in misdirection, avoiding the "actual purpose" of the HVIRA (Resp. Br. 4) — which is to foster litigation in California courts (Pet. Br. 10-12) — and focusing on other purported state "interests" that find no support in the statute's text, legislative history, or practical application (Pet. Br. 9-13, 48-50). The Commissioner argues that a plainly distinguishable decision of this Court, *Barclays Bank PLC* v. *Franchise Tax Bd.*, 512 U.S. 298 (1994) — which does not discuss the foreign affairs power or cite *Zschernig* v. *Miller*, 389 U.S. 429 (1968) — circumscribes the President's constitutional authority to negotiate and resolve issues arising out of World War II (Resp. Br. 24-26). And the Commissioner relies heavily on a federal statute, the U.S. Holocaust Assets Commission Act of 1998, Pub. L. No. 105-186, 112 Stat. 611, 22 U.S.C. § 1621 note, that does not mention statutes like the HVIRA or compelled disclosure of insurance records and plainly supports *presidential* authority to negotiate and resolve Holocaust-era insurance issues (Pet. Br. 30).

The Commissioner ultimately seeks to discredit (Resp. Br. 8-12) the efforts of the Clinton and Bush Administrations, which in "prolonged, intense international negotiations" have sought to "provide a dignified measure of justice to Holocaust survivors and their families worldwide." Pet. App. 174a-175a. The Commissioner maintains that the Constitution allows the California legislature to substitute its judgment for the President's judgment in determining what is in the national interest in conducting the "last great compensation related negotiation arising out of World War II." SER 940.

If accepted by this Court, the Commissioner's argument would not only subvert U.S. foreign policy on Holocaust-era insurance claims, and thereby "frustrate or prevent [the] attainment of" justice for Holocaust survivors (Pet. App. 179a), but also tie the hands of the President in negotiating future claims and disputes arising from wars and international

conflicts involving the United States. The most immediate consequence would be further damage to U.S. relations with Germany, Switzerland and other countries "at a time of international tension when relations between this Nation and its European allies are at their most sensitive." U.S. *Amicus* Br. 18.

I. THE HVIRA IMPAIRS THE FEDERAL GOVERNMENT'S FOREIGN AFFAIRS POWER.

A. *Zschernig*, Not *Barclays*, Governs This Case.

1. As described in our opening brief (at 24-32), the HVIRA violates the foreign affairs power under *Zschernig*, 389 U.S. at 434-435, 441. Any state law with more than an "incidental or indirect effect in foreign countries" or with "great potential for disruption or embarrassment" of U.S. foreign policy is unconstitutional — "even in the absence of" a federal statute, a treaty, or international negotiations on the subject. *Ibid.* The HVIRA conflicts with U.S. foreign policy in the "last major multinational negotiation with Germany for the wrongs perpetrated during Nazi Germany's ruinous period of power." SER 940.

In light of the *amicus* briefs filed by the United States, the Commissioner cannot dispute that the HVIRA conflicts with U.S. foreign policy on Holocaust-era insurance claims. As the United States' most recent brief explains (at 9), the "HVIRA is specifically concerned with gathering information concerning European insurance transactions in order to facilitate claims by and on behalf of victims of Nazi Germany." Thus, the "HVIRA threatens to impair the United States government's own approach to the resolution of Holocaust victims' claims — an approach that encourages the use of voluntary non-adversarial mechanisms, in contrast to coercive regulation and litigation." *Ibid.*

In an effort to distract attention from this serious impairment of U.S. foreign policy, the Commissioner characterizes the HVIRA as a "traditional" insurance regulatory statute with only minimal foreign effects. Resp. Br. 14-16. But the HVIRA

"is not a law of general applicability with only an incidental effect on matters outside the State or the United States." U.S. *Amicus* Br. 14. To the contrary, the statute was *expressly drawn* to influence the resolution of Holocaust-era insurance claims arising out of World War II in Europe. See Pet. Br. 25-28; Cal. Ins. Code § 13801(f). And the effect of the HVIRA is felt exclusively by European insurers and their regulators.

The HVIRA directly implicates the President's authority under Article II as Commander in Chief — "the sole organ of the nation in its external relations, and its sole representative with foreign nations," *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) — to resolve issues arising out of international conflicts involving the United States. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 682 (1981).

The Commissioner tries to distinguish *Zschernig* by asserting that the HVIRA "does not criticize or show hostility toward foreign governments." Br. 22. *Zschernig*, however, does not proscribe only "criticism" of foreign governments. It is also directed at state laws with "great potential for disruption or embarrassment" of U.S. foreign policy. 389 U.S. at 435. The HVIRA, which would impose enormous burdens on foreign insurers and undermine foreign insurance regulations, has already caused actual "disruption and embarrassment" of U.S. foreign policy. Pet. Br. 24-28. The HVIRA's effect on foreign citizens is significant as well. "[I]nternational controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government." *Zschernig*, 389 U.S. at 441.

Moreover, the HVIRA *does* manifest hostility toward European governments — particularly Germany, Switzerland, and Austria — and their oversight of domestic insurers. As the Commissioner himself explains (at 15-16), insurance "is a quasi-public industry" and European governments regulate the insurers that the Commissioner now alleges (at 1) are "wrongfully withholding insurance information from insureds and

beneficiaries." This is a direct criticism of European governments and their regulation of insurance, and not surprisingly has sparked vigorous protest. See, *e.g.*, FRG *Amicus* Br. 12-13.

In addition, the HVIRA refers specifically to Germany, see Cal. Ins. Code § 13802(a), and expresses dissatisfaction with the restitution of property and insurance proceeds, *id.* § 13801(b), for which the German government was made responsible under treaties with the United States and other countries.[1] Thus, even under the Commissioner's grudging reading of *Zschernig*, the HVIRA is plainly unconstitutional.

2. Unable to distinguish *Zschernig*, the Commissioner relies on this Court's decision in *Barclays*, but that case is wholly inapplicable, as the United States has explained (at 19). *Barlcays* did not address the federal government's foreign affairs power or *Zschernig*. Rather, *Barclays* "addressed an unusual situation" under the Commerce Clause "in which Congress and the Executive had taken divergent positions." U.S. *Amicus* Br. 19; 512 U.S. at 324-330. Moreover, Congress had expressly "condoned" the state tax at issue, *id.* at 329, and the state tax did not conflict with federal policy, *id.* at 330.

Here, by contrast, Congress has not "condoned" the HVIRA. The Commissioner looks for congressional authorization for the HVIRA in the U.S. Holocaust Assets Commission Act ("HACA") (Resp. Br. 12-14, 26-27), but as demonstrated in our opening brief (at 30; see U.S. *Amicus* Br. 19-21), the HACA endorses *presidential* leadership on this issue and gives no blessing to state statutes like the HVIRA. Indeed, the federal statute was enacted *prior to* the HVIRA.

The HACA established a federal commission "to examine issues pertaining to the disposition of Holocaust-era assets in

[1] U.S. foreign policy was to rehabilitate the West German government and make it responsible for compensation and restitution to the victims of Nazi Germany. See *Frumkin* v. *J.A. Jones, Inc.*, 129 F. Supp. 2d 370, 376 (D.N.J. 2001); Pet. Br. 3; FRG *Amicus* Br. 4-5.

the United States" and "to make recommendations to the President on further action." Pub. L. No. 105-186 (preamble). A majority of the Commission members were appointed by the President. *Id.* § 2(b)-(c). The HACA also obliged the Commission to "encourage the National Association of Insurance Commissioners to prepare a report on the Holocaust-related claims practices of all insurance companies," but only "to the degree the information is available." *Id.* § 3(a)(4)(A)-(B).

The HACA required the Commission to "submit a final report to the President" recommending "such legislative, administrative, or other action as it deems necessary or appropriate." Pub. L. No. 105-186, § 3(d)(1). The President was asked to "submit to the Congress any recommendations for legislative, administrative, or other action that the President considers necessary or appropriate." *Id.* § 3(d)(2).

In December 2000, the Commission issued its report to the President, *Plunder and Restitution: The U.S. and Holocaust Victims' Assets*. The report made a number of recommendations for action by the *federal government*, including that "[t]he United States should continue its leadership to promote the international community's commitment to addressing asset restitution issues." *Id.* at 25. The report made no recommendation regarding Holocaust-era insurance claims and did not suggest any proposed action by *state* governments.

The HACA's emphasis on presidential leadership indicates approval of the President's policy on Holocaust-era insurance claims. The HACA demonstrates no support for the HVIRA or the compulsion by any government of information on European insurance policies. The Commission itself lacked subpoena power. As the United States explains (at 21), the HACA took "a deliberately cautious approach, seeking to gather available information and to produce recommendations *for the President* as to what further measures might be appropriate. It provides no authority for California to pursue its own foreign policy, inconsistent with that pursued by the President."

Because Congress has not "condoned" the HVIRA and the state statute conflicts directly with U.S. foreign policy, the "repeated representations by the Executive Branch supported by formal diplomatic protests and concrete disputes" on this issue (*Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 386 (2000)) are highly probative, if not dispositive, on whether the State has unconstitutionally interfered with the federal government's foreign affairs power. The Commissioner's bold contention (Br. 26) that states can adopt their own statutes in conflict with U.S. foreign relations until Congress specifically disapproves them is unsupported by precedent and would impose an intolerable burden on Congress. Indeed, *Crosby* specifically rejected reliance on the fact that Congress had not preempted a state statute as a basis for concluding that Congress "approved" of the state law. 530 U.S. 386-388.

B. The Conflict Between The HVIRA And The President's On-Going Negotiations And Executive Agreements Infringes The Foreign Affairs Power.

Even in the absence of *Zschernig*, which applied a form of field preemption to state laws that have the "potential" to disrupt U.S. foreign policy (Pet. Br. 24), the serious conflict between the HVIRA and the President's on-going negotiations and Executive Agreements on Holocaust-era insurance claims renders the HVIRA unconstitutional as an impairment of the federal government's foreign affairs power (Pet. Br. 28-32).[2]

The President's already considerable authority over the Nation's foreign affairs is "at its maximum" in this context because he is acting pursuant to congressional approval of, or acquiescence in, his foreign policy. *Crosby*, 530 U.S. at 380. In *Dames & Moore*, 453 U.S. at 687, this Court found congressio-

[2] Negotiations on Holocaust-era issues, including insurance, continue. The President has a Special Envoy for Holocaust Issues, Ambassador Randolph M. Bell (Pet. App. 174a), and the Bush Administration intervened to facilitate negotiations on the recent agreement between ICHEIC and the German Foundation and German Insurance Association. Pet. Br. 8.

nal acquiescence in the fact that Congress did not act after holding hearings on the President's executive agreement with Iran. In this case, the HACA shows, at a minimum, congressional deference to the President's foreign policy on Holocaust-era insurance claims. Moreover, as in *Dames & Moore*, Congress has held multiple hearings on this subject with testimony by Clinton and Bush Administration officials, Pet. Br. 4-5, 7, 8-9; Pet. App. 126a, 174a, has been fully informed of the Executive Branch's approach to this delicate international issue, and has done nothing to indicate "its displeasure." 453 U.S. at 687.

The Commissioner responds that the Executive Agreements with Germany and Austria "'do not, of their own force, extinguish any claims that Holocaust victims or their families might assert in court against foreign insurance companies.'" Resp. Br. 29 (quoting U.S. *Amicus* Br. 13). The Commissioner reads this limitation to make the agreements nugatory with respect to the HVIRA. *Id.* at 29-30. But the cited language has no such implication. The provision was included "[b]ecause the claims almost exclusively concern persons and transactions that had no relation to the United States at the time of the conduct at issue * * * [and] the United States government did not seek to extinguish or resolve the claims under the laws or international agreements of this Nation or by coercive processes under our laws." U.S. *Amicus* Br. 13 n.7.

This case does not involve individual insurance claims, and instead challenges a state regulatory statute. The provisions of the Executive Agreements relevant to this issue provide that the "United States, recognizing the importance of the objectives of this agreement, including all-embracing and enduring legal peace, shall, in a timely manner, use its best efforts, in a manner it considers appropriate, to achieve these objectives with state and local governments." Pet. App. 156a (Executive Agreement with Germany, Art. 2 (2)).

These provisions preserve maximum flexibility for the President to determine which state laws conflict with the

Executive Agreements and undermine the goal of "legal peace." In this case, the Executive Branch has repeatedly stated that the HVIRA conflicts with U.S. foreign policy. As *Crosby* makes clear, this flexibility — unencumbered by state law — is an important component of the President's diplomatic leverage and bargaining power. 530 U.S. at 376-382.

The Commissioner's contrary position would undermine the President's authority to negotiate. According to the Commissioner (at 20), "[i]f the HVIRA is an irritant to the Executive Branch and foreign governments, * * * the Executive can enter into a treaty with those governments or seek relief from Congress." In the Commissioner's view, unless there is a treaty in place or a congressional statute in force, the states are free to engage in their own foreign policy — whether or not that policy conflicts with the federal government's policy or on-going negotiations. This result would eviscerate the foreign affairs power, which was reaffirmed in *Crosby*, 530 U.S. at 381-382 n.16, and the President's ability to speak for the Nation in negotiations with foreign governments. Neither the Constitution nor this Court has so limited the President's authority to negotiate complex issues arising out of a world war or other international crisis. See *Dames & Moore*, 453 U.S. at 678.

C. The Commissioner's Challenge To ICHEIC Is Irrelevant And Meritless.

Instead of coming to grips with the conflict between the HVIRA and U.S. foreign policy, the Commissioner devotes much of his brief to challenging the wisdom and efficacy of the U.S. policy. He criticizes ICHEIC, which both the Clinton and Bush Administrations have concluded should be "the exclusive remedy for unresolved insurance claims from the National Socialist era and World War II." Pet. App. 177a, 135a. The "entire" German, Austrian, and Dutch insurance industries "are committed to using ICHEIC procedures for Holocaust-era claims." *Id.* at 176a-177a. Other members of ICHEIC include "Axa, Generali, Winterthur, and Zurich." *Id.* at 136a.

The Commissioner asserts that ICHEIC is ineffective, but the authorities on which he relies (Resp. Br. 10) predate the recent implementation of the agreement by ICHEIC with the German Foundation and the German Insurance Association in September 2002 "on the processing and payment of insurance claims against the entire German insurance industry." Pet. App. 177a. Under this agreement, "$100 million from the German Foundation will be made available to pay valid insurance claims against German companies and $175 million will be distributed by ICHEIC for humanitarian purposes." *Ibid.*

A "chief component" of the agreement is the creation of the "most comprehensive listing ever available of insurance policies issued to Jewish residents of Germany during the National Socialist era." Pet. App. 177a. In light of imminent publication of this list, ICHEIC on March 14, 2003, extended the deadline for filing claims to September 30, 2003. See <http://www.icheic.org/eng/MAR1203.pdf>. The list of "additional policyholders from Germany and Eastern Europe" will be made available on the ICHEIC website, *ibid.*, without violating European privacy laws.[3]

The Commissioner complains (Br. 10) that not all European insurers are members of ICHEIC. The United States has "encourage[d] all insurers that issued policies during the Holocaust era" to join ICHEIC and many have, Pet. App. 136a,176a-177a. But the HVIRA and similar statutes have "undermined" the United States' ability "to persuade foreign governments and foreign enterprises to participate in voluntary mechanisms" like ICHEIC. U.S. *Amicus* Br. 9; Pet. App. 125a. If as a consequence of this interference the ICHEIC process fails, the result will be "years" of litigation in U.S. courts with

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[3]Representatives of the Conference on Jewish Material Claims Against Germany, the Jewish Agency for Israel, and the State of Israel have "accept[ed] the ICHEIC-Foundation agreement as a valid and worthy result" and "have endorsed the agreement's key provisions for publishing the most comprehensive list possible of German policyholders who may have been Holocaust victims." Pet. App. 178a.

uncertain results for elderly Holocaust victims whose claims will be subject to a "variety of legal defenses." *Id.* at 132a. U.S. foreign policy has sought to avoid that pernicious result; the California legislature, whether or not it believes that the federal effort is misguided, has no authority to substitute its policy for the U.S. policy on this issue.

II. THE HVIRA IS INVALID UNDER THE COMMERCE CLAUSE.

A. The HVIRA Cannot Be Reconciled With Governing Commerce Clause Principles.

1. The Commissioner entirely fails to engage our argument that the HVIRA is unconstitutional under the Commerce Clause. To begin with, there can be no serious doubt that the HVIRA is "extraterritorial legislation" in the sense that the Court has used that term in its Commerce Clause decisions. The Commissioner does argue, halfheartedly, that the HVIRA is not extraterritorial because it "is a California regulation of California insurance companies." Br. 36. But that contention rests on a transparent formalism. The statute's impact on domestic companies is, of course, simply the hook used by the State to induce *foreign* companies to make disclosures of information held *overseas* that concerns transactions *conducted in Europe* — disclosures that the State could not compel directly. In this respect, the HVIRA is identical to many other state laws that the Court has invalidated under the Commerce Clause because of their extraterritorial impact: all used state power over an entity that had some in-state presence to compel actions that otherwise lay outside the enacting state's jurisdiction. See, *e.g.*, *Healy* v. *Beer Inst., Inc.*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573 (1986). Indeed, because states by definition cannot directly enforce laws that purport to govern conduct in other states or nations, extraterritorial legislation necessarily will operate on the model of the HVIRA.

As a second line of defense, the Commissioner asserts that the Court's decisions in this area condemn only "a particular kind of extraterritorial effect on pricing in interstate competitive markets." Br. 37. But that contention also is insupportable. The Court has made quite clear that state legislation is invalid under the Commerce Clause whenever its "practical effect * * * is to control conduct beyond the boundaries of the State" because such a law "exceeds the inherent limits of the enacting State's authority" and "'would offend sister States.'" *Healy*, 491 U.S. at 336 & n.13 (citation omitted); *BMW of North Am., Inc.* v. *Gore*, 517 U.S. 559, 571-573 (1996). See also *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, No. 01-1289, slip op. at 10-11 (U.S. Apr. 7, 2003). This fundamental "limit[] on a State's power to enact substantive legislation" (*Edgar* v. *MITE Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion)) has nothing to do with the content of particular pricing rules that a state might seek to project beyond its borders. To the contrary, as the United States observes (at 26), the Court applied the extraterritoriality principle in *BMW* to invalidate a state's attempt to impose nationwide *disclosure* obligations. See *BMW*, 517 U.S. at 570, 572-573. The HVIRA accordingly cannot survive this limit on state authority.[4]

2. The Commissioner also is incorrect in contending (Br. 37-38) that the HVIRA passes the Commerce Clause "one-

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[4] In arguing to the contrary, the Commissioner points to the *MITE* plurality's citation of *Hall* v. *Geiger-Jones Co.*, 242 U.S. 539 (1917), which upheld a state "blue-sky" securities law that required disclosure of extra-state securities sales. Resp. Br. 36-37 (citing *MITE*, 457 U.S. at 641). The statute at issue in *Hall*, however, was decisively different from the HVIRA. It imposed obligations on businesses that *themselves* engaged in securities transactions in the regulating state; the *MITE* plurality explained, in language curiously omitted by the Commissioner, that "[t]he Court's rationale [in *Hall*] for upholding blue-sky laws was that they only regulated transactions occurring within the regulating States." 457 U.S. at 641. In contrast, the plurality concluded that the state law challenged in *MITE* was impermissibly extraterritorial because it "directly regulate[d] transactions which take place across state lines." *Ibid.* That also is true of the HVIRA.

voice" test. The Commissioner relies entirely on *Barclays*. The considerations that controlled that case, however, are wholly absent here. In *Barclays*, the Court found that Congress had "indicate[d] that [the challenged] state practices [did] not 'impair federal uniformity in an area where federal uniformity is essential.'" 512 U.S. at 323 (citation omitted). Pointing to a lengthy history during which Congress declined to enact "numerous bills" that would have displaced the challenged state law, and during which the Senate rejected a proposed treaty that would have done the same thing (see *id.* at 324-327), the Court found dispositive these positive "indicia of Congress' willingness to tolerate" the state rule at issue. *Id.* at 327. The Court expressly confirmed that point in *Crosby*, explaining that *Barclays* "found the reactions of foreign powers and the opinions of the Executive irrelevant" because "Congress had taken specific actions rejecting the positions both of foreign governments * * * and the Executive." 530 U.S. at 385.

As we note above, however, there are no such affirmative indicia of Congress's acquiescence in the HVIRA. There have been no bills introduced and rejected that would have displaced the California law. Congress did not disregard calls for such legislation by the Executive. No proposed treaties foreclosing HVIRA-like legislation have been repudiated by the Senate. The HACA predated the HVIRA and therefore could not be thought to signify congressional validation of the state law — and, as we have explained (at 4-7, *supra*), that statute is in any event fundamentally inconsistent with the approach taken by the HVIRA. Given these considerations, the analysis in *Barclays* cuts powerfully *against* the Commissioner's case.

The controlling authority here is *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979) — which, although it is the Court's seminal modern decision under the Foreign Commerce Clause, the Commissioner fails even to cite. In that case, as in this one, an international agreement "reflect[ed] a national policy" that was inconsistent with the challenged state law, although the agreement did not actually preempt the state

legislation. *Id.* at 453. In that case, as in this one, the challenged state law "create[d] an asymmetry in international [law] operating to [another nation's] disadvantage." *Ibid.* And in that case, as in this one, the challenged state law violated the "one-voice" principle because "California, by its unilateral act, [could] not be permitted to place these impediments before this Nation's conduct of its foreign relations and its foreign trade." *Ibid.* It is not surprising, in this context, that the Commissioner would prefer to ignore *Japan Line*. But that decision remains good law: it was quoted in *Barclays* as stating the controlling test (see 512 U.S. at 320) and was more recently cited with approval in *Crosby*. See 530 U.S. at 381-382 n.16. The "one-voice" principle, like the rule against extraterritoriality, accordingly compels invalidation of the HVIRA.

B. The HVIRA Is Not Saved By The McCarran-Ferguson Act.

Perhaps because he has so little so say about the scope of the Commerce Clause, the Commissioner places most of his eggs in the McCarran-Ferguson Act basket, contending that the Act insulates the HVIRA against Commerce Clause attack (Br. 32-36). This argument lacks merit, for several reasons.

1. The Commissioner recognizes, as he must, this Court's holding in *Federal Trade Comm'n* v. *Travelers Health Ass'n*, 362 U.S. 293 (1960), that Section 2(b) of the McCarran-Ferguson Act does not authorize extraterritorial state laws. That concession should be fatal to his argument. As noted in our opening brief (at 40-41), and as the Commissioner acknowledges (at 34), Section 2(a) of the Act — the provision on which he relies — uses language essentially identical to that in section 2(b) when describing the universe of state laws that are affected by the Act.[5] Moreover, as we also argue in our opening brief (at

[5] It would take remarkable verbal gymnastics to conclude that Section 2(b)'s phrase "regulated by State law" contemplates anything other than the "laws of the several States which relate to the regulation" of insurance that are identified in Section 2(a).

41), it would be nonsensical to construe these two provisions as differing in scope: such a reading would attribute to Congress an intent simultaneously to *displace* the Constitution but to *preserve* federal statutory law as it applies to exterritorial state insurance regulations. Indeed, the Commissioner's approach, which posits that Section 2(a) of the Act allows for extraterritorial state regulation of insurance, would mean that the very extraterritorial state law at issue in *Travelers could* be applied to govern out-of-state transactions, an outcome that would permit states to impose inconsistent and conflicting requirements on insurers that engage in business across state lines. The Commissioner entirely fails to address this point.

Instead, the Commissioner places principal reliance on 15 U.S.C. § 1011, the McCarran-Ferguson Act's statement of legislative purpose, which declares that "silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of [the business of insurance] by the several States." Here, however, the Commissioner simply assumes his conclusion. It is true that congressional silence does not invalidate state laws that fall within the scope of the Act. But the scope of the Act is determined by Section 2(a) — which, for reasons we have explained, must be understood to exclude extraterritorial state laws. Any other conclusion would make Section 2(a) superfluous.

2. We noted in our opening brief (at 41-42) that the background and purposes of the McCarran-Ferguson Act confirm that it cannot be read to validate state laws that have an extraterritorial effect. In response, the Commissioner takes this history to show only "Congress' understanding that the Act did not purport to eliminate due process limits on state legislative jurisdiction." Br. 35-36. But that argument altogether disregards the central goal of the Act. Because "the business of insurance has been regarded as a local matter," Congress enacted the Act to restore the state authority to regulate insurance that had been recognized prior to the decision in *United States* v. *South-Eastern Underwriters' Ass'n*, 322 U.S. 533 (1944); it was

expressly "not the intention of Congress in the enactment of th[e] legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision" in *South-Eastern Underwriters' Ass'n*. H.R. Rep. No. 142, 79th Cong., 1st Sess. 3 (1945). And as Congress knew, prior to the decision in *South-Eastern Underwriters' Ass'n* states consistently had been held to *lack* the authority to engage in extraterritorial insurance legislation. See *ibid.* Viewed in that context, a statute that was premised on the "local" nature of insurance could hardly have been intended to preserve extraterritorial state laws. Cf. *Healy*, 491 U.S. at 342 (although the Twenty-first Amendment gives states great leeway to regulate the sale of alcoholic beverages, the Amendment "does not immunize state laws from invalidation under the Commerce Clause when those laws have the practical effect of regulating liquor sales in other States").

The Court made this point in *Travelers*, finding it "clear that Congress viewed state regulation of insurance solely in terms of regulation by the law of the State where occurred the activity sought to be regulated." 362 U.S. at 300. This was not, as the Commissioner would have it, a case of Congress fastidiously taking extra care to explain that it did not mean to displace due process precedents regarding extraterritoriality even as it enacted legislation that shielded extraterritorial state laws from invalidation under the Commerce Clause. To the contrary, the sponsors of and conferees on the McCarran-Ferguson Act "repeatedly emphasized that the provision did not authorize state regulation of extraterritorial activities." *Id.* at 301 (citing congressional debate). The "basic motivating policy behind the legislative movement that culminated in the enactment of the McCarran-Ferguson Act" therefore precludes application of the Act to save extraterritorial state laws. *Ibid.* See *State Bd. of Ins.* v. *Todd Shipyards Corp.*, 370 U.S. 451, 456 (1962) (even if due process holdings precluding extraterritorial state regulation of insurance were open to question, by enacting the McCarran-Ferguson Act Congress "indicated

without ambiguity that such state 'regulation or taxation' should be kept within the limits set by" those decisions). Indeed, the Court in *Travelers*, citing a pre-Act *Commerce Clause* decision, specifically referred to the constitutional problems that would arise if the Nebraska insurance law at issue were construed "to regulate any given aspect of extraterritorial activity." 362 U.S. at 302 (citing *Western Union Tel. Co.* v. *Brown*, 234 U.S. 542 (1914)). *Travelers* completely refutes the Commissioner's reading of the McCarran-Ferguson Act.

3. The Commissioner also errs in contending (at 32) that the Court has held that the Act "insulates state insurance regulations from *all* Commerce Clause attack, even where the regulation has extraterritorial effects." The authority he cites (Br. 32-33 & n.17) stands for no such proposition. In contrast to the HVIRA, the state laws at issue in *Western & Southern Life Ins. Co.* v. *State Bd. of Equalization*, 451 U.S. 648 (1981), and *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408 (1946), did not address the extraterritorial conduct of insurers; those laws taxed the companies' local, *in-state* activities (albeit at discriminatory rates) and therefore have no relevance to this case. See *Western & Southern*, 451 U.S. at 651, 654; *Benjamin*, 328 U.S. at 410. *Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869 (1985), likewise involved a discriminatory tax that made no attempt to affect the out-of-state activities of insurers (and that the Court held unconstitutional under the Equal Protection Clause). See *id.* at 871-872, 883. The Commissioner draws even less support from *Todd Shipyards*: the Court *struck down* as impermissibly extraterritorial a premium tax that was levied on insurance contracts negotiated and paid outside the taxing state, because it understood the McCarran-Ferguson Act specifically to approve the Court's pre-Act decisions holding that states lack the authority to tax extra-state activities. 370 U.S. at 455-458. In fact, this Court *never* has upheld under the Act a state's attempt to regulate insurance activities taking place outside its borders.

III. THE HVIRA EXCEEDS DUE PROCESS LIMITS ON LEGISLATIVE JURISDICTION.

The Commissioner's due process argument is based largely on the contention that we have mischaracterized the HVIRA by relying on its "actual purpose." Resp. Br. 38. In so arguing, the Commissioner confuses a subjective inquiry into legislators' "motives" with an objective inquiry into the purpose and effect of the statute. See *id.* at 44 (citing the "difficulty of determining legislative purpose or motive"). Our inquiry into the purpose of the HVIRA is part of a traditional construction of the statute based on its text, legislative history, and interrelated provisions passed by the California legislature at the same time. It is not a subjective inquiry into legislative motive.

Apart from the Commissioner's quibbles over motive, the undeniable purpose and effect of the HVIRA is to compel conduct overseas. The HVIRA regulates extraterritorially in violation of due process. See U.S. *Amicus*. Br. 24-30.

A. The HVIRA Fosters Litigation And Is Not A "Reporting" Or "Fitness" Statute.

The Commissioner dismisses consideration of the "actual purpose" of the HVIRA in the context of California's Holocaust insurance compensation program with the assertion that it is "improper[]" to refer to "other California statutes" related to the HVIRA because they are "*not* part of this litigation" and their constitutionality is "*not* before this Court." Resp. Br. 7; *id.* at 42 n.19. But petitioners have never suggested that the constitutionality of the California statutes related to the HVIRA are at issue. Rather, we have cited those closely related provisions to provide the context in which the HVIRA operates (Pet. Br. 11-13). It is "the most rudimentary rule of statutory construction * * * that courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part." *Branch* v. *Smith*, 123 S. Ct. 1429, 1445 (2003) (plurality opinion) (citing *United States* v. *Freeman*, 44 U.S. (3 How.) 556, 564-565 (1845)).

As described in our opening brief (at 9-13, 36-38, 47-50), the HVIRA regulates foreign insurance contracts to foster litigation in California. The Commissioner responds that the HVIRA is a benign "reporting statute" that "seeks only the disclosure of insurance policy information." Resp. Br. 6-7. He further maintains (at 8 n. 5) that Section 354.5 of the California Code of Civil Procedure — which was adopted in the same bill that enacted the HVIRA ((Pet. App. 117a-118a)) — "does *not* confer personal jurisdiction over foreign affiliates, does *not* create any new right of action, and does *not* impose liability on the local licensee under policies issued by a foreign affiliate."

Each of these assertions is wrong. First, as demonstrated in our opening brief (at 36-38, 47-48) without contradiction by the Commissioner, the compelled production of voluminous information about tens of millions of insurance policies from European archives in violation of foreign privacy laws is a form of regulation under this Court's precedents. Second, as demonstrated in our opening brief (at 37, 48), again without contradiction by the Commissioner, the HVIRA (Cal. Ins. Code § 13802(c)) changes the substantive terms of foreign insurance contracts by redefining the "proceeds" of such policies to exclude wartime or postwar currency devaluation. This change leaves insurers open to the claim that they have failed to pay all of the "proceeds" due under policies that were fully paid under governing foreign law. That is plainly "substantive" regulation of foreign insurance policies and foreign insurers.

It is equally clear that the extraterritorial regulation of European insurance policies by the HVIRA is designed to facilitate litigation on those policies in California. The Commissioner misleads the Court in stating that Section 354.5 of the California Code of Civil Procedure does not expand liability under California law. Resp. Br. 8 n. 5. As described in our opening brief (at 12), a California insurer may now be held liable for a Holocaust-era policy issued in Europe by any of its "related compan[ies]" — regardless of whether the California insurer exercised any control over the "related" company or

whether the companies were even related when the policy was issued. This is a dramatic expansion of liability under California law and is accompanied by a lengthy extension of the statute of limitations. Cal. Code Civ. Proc. § 354.5(c).

The information compelled by the HVIRA allows Holocaust-era insurance claimants to file actions under the expanded liability and statute of limitations provisions of Cal. Code Civ. Proc. § 354.5. That is the sole purpose of the HVIRA, as its text and legislative history explain (Pet. Br. 9-10, 48-50). See Pet. App. 119a, 122a (sole purpose of statute is the "resolution of claims under insurance policies held by Holocaust victims").

The Commissioner adverts to "a number" of other unspecified "state regulatory interests" supporting the HVIRA (Br. 6), although the only purported interest he can identify is "consumer protection" against unfit insurers that have "stonewall[ed]" claimants. See, *e.g.*, Resp. Br.1-2, 42-44. But as demonstrated in our opening brief (at 48-50), the current fitness of California insurers cannot be assessed from the mass of information required by the HVIRA about millions of insurance policies issued by other companies and in effect in Nazi-occupied Europe from 1920 to 1945. Indeed, the Commissioner himself admits (Resp. Br. 7) that the HVIRA "makes no judgment as to whether policies have been properly paid." But without such a "judgment," there is no basis to determine the fitness of an insurer. That is why there is no reference to insurer fitness or licensing standards in the text of the HVIRA, its legislative history, or its application by the California Department of Insurance.

B. The State Lacks Minimum Contacts With The European Insurance Policies And Insurers Regulated By The HVIRA.

The Commissioner cites two facts to show the minimum contacts (or the rational connection) between the State and the transactions and insurers regulated by the HVIRA required by

due process (Resp. Br. 48-50): the presence in the State of insurers "related" to the European insurers that issued Holocaust-era insurance policies and the presence in the State of approximately 5,600 Holocaust survivors (Cal. Ins. Code § 13801(d)). Neither is constitutionally sufficient to provide the State with legislative jurisdiction.

The fortuity that California-licensed insurers may be related to European insurers that issued Holocaust-era policies is, as we described in our opening brief (at 46), merely a subterfuge to allow the State to regulate European insurance policies, which are already subject to regulation by European governments. No decision by this Court has sanctioned that result. Indeed, the argument propounded by the Commissioner knows no logical bounds. New York insurers could be compelled by California to disclose information that must be kept private under New York law. In support of "consumer protection," any California business in any industry could have its affiliates in other states or countries extensively regulated by California law.

As for presence of several thousand Holocaust survivors in the State, we have already demonstrated (Pet. Br. 46) that a post-transaction change of residence is not a sufficient basis for a forum state to impose its law on a foreign transaction and foreign insurer. In this case, the Commissioner relies on the fact that a tiny percentage of the worldwide population of Holocaust survivors moved to California after World War II to provide the State with jurisdiction over *every insurance policy in effect in Nazi-occupied Europe during a 25 year period*. The imposition of California law on those European insurance contracts would clearly frustrate the expectations of the parties to those contracts — the overwhelming majority of whom have no connection to California.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, AMERICAN RE-INSURANCE COMPANY, ET AL.,

Petitioners,

v.

JOHN GARAMENDI, IN HIS CAPACITY AS COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE RESPONDENTS — GERLING COMPANIES — IN SUPPORT OF PETITIONERS

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STATEMENT PURSUANT TO RULE 29.6

The Rule 29.6 statement for each of the respondent Gerling Companies is set forth in their petition for a writ of certiorari (Docket No. 02-733) at page iii, and there are no amendments to those statements.

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REPLY BRIEF FOR THE GERLING COMPANIES

The Commissioner defends the HVIRA as "an insurance regulation that seeks disclosure of withheld insurance policy information from private companies doing business in California." Brief for Respondent (hereinafter, "Resp. Brf.") at 1. He reinvents the HVIRA as "a California regulation of California insurance companies." Resp. Brf. at 36. Although it exclusively seeks European insurance information, he goes so far as to suggest that the HVIRA "does not even require out-of-state insurers to gather and compile" the information demanded. *Id.*

On its face and as applied, the HVIRA has little, if anything, to do with the business of insurance in California. It does not regulate any in-state activity of any California insurers. In the case of the Gerling Companies, it does not even request information in the possession or control of California insurers. It is simply an attempt to use presently-licensed California companies to access millions of insurance policies issued in Europe, to Europeans, by European companies.

The HVIRA *only* requires action by European insurers. It *only* requires production of information concerning European insurance transactions. It *only* seeks information maintained in Europe and which is subject to the laws of European nations. In sum, it constitutes an attempt by California to investigate and regulate European companies and European transactions.

The HVIRA demands production of voluminous and detailed information regarding every single insurance policy in effect in Europe between 1920 and 1945. CAL. INS. CODE § 13804(a). California-licensed insurers are required to obtain this information from any "related company" that issued policies in Europe. "Related company" is broadly defined to include familial corporate relationships (*i.e.*, parents, subsidiaries or

affiliates), as well as non-familial corporate relationships, such as reinsurers and managing general agents. CAL INS. CODE § 13802(b). The HVIRA imposes the draconian penalty of mandatory license suspension for failure to comply without any regard to the California insurer's ability to obtain the information from such "related companies."

The HVIRA does not regulate California insurers or the business of insurance in California in any meaningful way. It requires no action on the part of California companies other than performance of the ministerial function of funneling insurance information from Europe to California. In the words of the Eleventh Circuit, the California companies are nothing more than "nominally regulated" parties. *Gerling Global Reinsurance Corp. of America v. Gallagher*, 267 F.3d 1228, 1238 (11th Cir. 2001). As the district court correctly observed, "the gist of the HVIRA is not about licensing insurance companies, but rather about forcing companies to report on insurance policies issued in Europe and using the threat of license suspension as an enforcement mechanism." App. at 133a.[1]

Unlike a true "licensing" or "fitness" statute, the HVIRA does not establish rules for conducting the business of insurance in California. In fact, the HVIRA only imposes obligations on companies that have already been licensed in the State. It imposes no obligations on companies who are simply applying for a California license (and whose "fitness" has yet to be established). The HVIRA does not serve as an entryway to the California market. Instead, it uses existing California licenses to effectively regulate insurers and transactions over which the State has no direct authority.

In his brief, the Commissioner tries to recast the HVIRA in ways never articulated by the California legislature. For instance,

1. References to "App." are to the documents appended to the brief submitted by the Gerling Companies in support of their petition for certiorari (No. 02-733).

he uses the terms "affiliate" (which includes companies with corporate familial relationships) and "related company" (as defined under the HVIRA) interchangeably, thereby suggesting that the HVIRA requires insurers to obtain information exclusively from their own corporate relatives. *See, e.g.*, Resp. Brf. at 38 (stating that HVIRA requires information solely from California insurers "or their affiliates.") In fact, the HVIRA's "related company" definition sweeps in broad categories of companies outside the "corporate family" of the California insurer.

The Commissioner also suggests that the HVIRA requires information merely where there is a "control" relationship between the California insurer and the European company in possession of the documents. *See, e.g.*, Resp. Brf. at 2. In fact, the HVIRA does not contain such a limitation; it also requires insurers to obtain information from companies over which they have no control. The district court has expressly determined that the Gerling Companies do not have control over the insurance records of their distant German corporate relatives. Nevertheless, the HVIRA *requires* the Commissioner to suspend the licenses of these California insurers notwithstanding their lack of possession or control over the information demanded.

Whether analyzed under due process or Commerce Clause principles, the HVIRA constitutes impermissible regulation of European companies and European insurance transactions. In addition, it interferes with the effective operation of U.S. foreign policy in violation of *Zschernig v. Miller*, 389 U.S. 429 (1968).

I. THE HVIRA VIOLATES THE DUE PROCESS CLAUSE

A. The HVIRA Exceeds California's Legislative Jurisdiction

Longstanding decisions of this Court clearly "stand for the proposition that if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310-311 (1981).[2] As Petitioners have demonstrated, California has no identifiable contacts with the relevant parties or transactions which would authorize the exercise of its legislative jurisdiction in this context.

The Commissioner's primary defense of the statute is his claim that "the HVIRA regulates only insurance companies doing business in California" by requiring reporting of Holocaust-era policy information "written by them or their affiliates." Resp. Brf. at 38. This post-litigation justification conflicts sharply with the rationale that the Commissioner offered the California legislature prior to enactment: "[t]he Department [of Insurance] believes this bill will be of significant assistance to the Department in its endeavor to ensure full payment of claims to Holocaust survivors and their descendants." Reply App. at 5a.[3] The Commissioner's current argument also conflicts with the language of the HVIRA itself; a statute which demands production of information regarding

2. *See also* Brief for the Petitioners (American Insurance Association and American Re-Insurance Company) (No. 02-722) at 43-45.

3. References to "Reply App." are to the documents appended to the reply brief submitted by the Gerling Companies in support of their petition for certiorari (No. 02-733).

all insurance policies issued in Europe between 1920 and 1945. CAL. INS. CODE § 13804(a).[4]

Apparently unable or unwilling to defend the statute as enacted by the California legislature, the Commissioner offers the Court (as he did the Ninth Circuit) a distorted version of the record. For example, he claims that the issue of whether foreign law bars disclosure of the information demanded is disputed. Resp. Brf. at 22, n.10. In fact, the district court already concluded that the Gerling Companies do not have control over the information required by the HVIRA.[5] App. at 47a. Similarly, the German government has repeatedly concluded that compliance by German companies with the HVIRA would cause them to violate German laws and thereby become subject to

4. The record could not be more clear that the State of California views the HVIRA as a tool to effect the conduct of European insurers. *See, e.g.*, ER 1111 (Department of Insurance senior counsel stated that HVIRA "clearly goes beyond the California licensed company."); ER 1113-1115 (the Commissioner demanded that representatives of German companies with no U.S. presence be made available to discuss compliance with HVIRA); SER 901-908 (California Treasurer issued a written demand to a German affiliate of the Gerling Companies that it should comply with HVIRA to "eliminate" litigation).

5. The Commissioner argues that a company could avoid regulatory investigation simply by moving documents into the hands of off-shore affiliates. Resp. Brf. at 3-4. In fact, if the insurer has the ability to move documents overseas, that insurer must have possession or control over those documents. Here, the Gerling Companies have never had possession or control of the information sought under the HVIRA as they never issued policies in Europe during World War II. ER 643, 648, 653, 658, 663, 668. Likewise, his argument that states routinely obtain information from foreign companies is misleading and disingenuous. Resp. Brf. at 2-3. In support, the Commissioner cites to CAL. INS. CODE §§ 1215.2(d)(5), 1215.4(g) and 1215.6. Every single one of these statutes presupposes an element of control between the regulated and foreign company or is applicable where the foreign company is conducting business directly in California. The same applies to the additional statutes cited by the Ninth Circuit. App. at 23a, n.10.

civil and criminal penalties. Brief for the Federal Republic of Germany as *Amicus Curiae* in Support of Petitioners (dated Feb. 24, 2003) ("Feb. 24, 2003 *Amicus* brf. of FRG") at 14.[6]

To support his new characterization of the HVIRA, the Commissioner takes extraordinary liberties in providing the Court with a revisionist history of the origins and purpose of the statute (legislation which he aggressively supported). Specifically, the Commissioner seeks to distance the HVIRA from its companion statute which purports to empower California courts to entertain Holocaust-related litigation. CAL. CIV. PRO. CODE § 354.5. In fact, these provisions were included in the same legislation as the HVIRA. AB 600 (the "Knox Bill") Lodg., L-36-L-41.[7] According to the California legislature, "[t]he author introduced this bill in order to ensure that Holocaust victims or their heirs can take direct action on their own behalf with regard to insurance policies and claims." Reply App. at 4a.

The Knox Bill (and the resulting HVIRA) has nothing to do with an insurance company's fitness to write insurance in California. The HVIRA had a single purpose from the start: the payment of European insurance claims pursuant to California-imposed standards.[8] It attempts to effect conduct far beyond the

6. *See also* ER 846; SER 1248; Mar. 15, 2002 *Amicus* brf. of FRG at 6; Aug. 5, 2002 *Amicus* brf. of FRG at 9-10; Dec. 12, 2002 *Amicus* brf. of FRG at 4.

7. References to "Lodg." are to the documents contained in the Lodging filed by the Gerling Companies in support of their petition for certiorari.

8. The California Senate Floor Analysis of the Knox Bill contains a nine paragraph summary of this legislation. Paragraph eight of this document affirmatively states that the bill "[w]ould authorize legal actions on Holocaust insurance claims arising out of insurance policies purchased or in effect in Europe before 1945." Reply App. at 4a.

borders of the State. As such, it constitutes impermissible extraterritorial legislation and exceeds California's legislative jurisdiction.

B. The Rationale Of The Eleventh Circuit In *Gallagher* Controls

The reasoning adopted by the Eleventh Circuit in *Gallagher* should be dispositive here as well. In *Gallagher*, the Eleventh Circuit addressed a materially identical Holocaust-related insurance reporting statute which Florida sought to enforce against the same Gerling Companies. The Eleventh Circuit held:

> . . . to the extent the [Florida] Act calls for the production of information by these Plaintiffs [the Gerling Companies] regarding Holocaust-era policies issued outside of Florida by German entities having only some corporate affiliation with them and no other contacts to Florida, it violates Due Process limits of legislative jurisdiction.

Gallagher, 267 F.3d at 1240. The Eleventh Circuit found that Florida's

> reporting provisions pertain to, and as a practical matter, unquestionably seek to regulate, a subject matter – the German affiliates' payment or non-payment of Holocaust-era claims – with no jurisdictionally- significant relationship to Florida.

Id. at 1238.

The Commissioner's current attempt to distinguish the *Gallagher* decision is simply unfounded. Contrary to the Commissioner's assertion, the Eleventh Circuit did not hold the Florida Act unconstitutional because it did not have a

"consumer protection purpose." Resp. Brf. at 47. The Eleventh Circuit found the Act unconstitutional because it was effectively trying to regulate the Gerling Companies' German affiliates. Like the Commissioner in the instant matter, the Florida Commissioner put forth a litigation-manufactured justification for the Act. The Eleventh Circuit rejected this argument in view of the plain language of the Act. In addition, the Eleventh Circuit specifically stated that it was dealing *solely* with the reporting provisions of the Florida statute. *Gallagher*, 267 F.3d at 1234. Thus, the statutory provisions reviewed by the Eleventh Circuit were virtually identical to those contained in the HVIRA.

California enacted the HVIRA for the same reasons the Florida Act was enacted i.e., to investigate and resolve European insurance claims. *See* CAL. INS. CODE §§ 13801(e)-(f); App. at 83a; Reply App. at 4a-5a. For the reasons articulated by the Eleventh Circuit, the HVIRA exceeds California's legislative jurisdiction.

C. California Lacks the Requisite Minimum Contacts With The Regulated Companies And Transactions

In his brief, the Commissioner argues that the HVIRA satisfies the "minimum contacts" test required by the Due Process Clause. Specifically, he claims that California can require California insurers to disclose information that is relevant to "state interests." Resp. Brf. at 39. The issue is not whether the Commissioner can compel insurers under his regulatory authority to provide information to the State. The issues are whether the Commissioner can compel *foreign* companies to provide information to him by threatening the licenses of California insurers and whether the State has a sufficient interest in those foreign companies' transactions.

He further argues that the answer to whether California has "minimum contacts" with the subject matter turns on whether

the State has a legitimate interest that justifies the statute. Resp. Brf. at 40-45. There is simply no legal basis for this assertion. The test for "minimum contacts" under a legislative jurisdiction analysis is akin to that used in personal jurisdiction case law. *American Target Advertising, Inc. v. Giani*, 199 F.3d 1241, 1255 (10th Cir. 2000). "There must be at least some minimal contact between a State and the regulated subject before it can, consistently with the requirements of due process, exercise legislative jurisdiction." *Id.*; *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 315 n.2 (1970) (Harlan, J., dissenting) (citing *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930)); *American Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County*, 221 F.3d 1211 (11th Cir. 2000); *Adventure Communications v. Kentucky Registry of Election Fin.*, 191 F.3d 429, 437 (4th Cir. 1999) (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981)).[9]

Finally, the Commissioner asserts that (1) the Petitioners' business presence; and (2) the residence of thousands of Holocaust victims in California provide California with a sufficient "nexus" to satisfy the Due Process Clause. Resp. Brf. at 48-50. There is no dispute regarding the State's ability to regulate the in-state conduct of companies jurisdictionally present in California. The fact is, however, that the HVIRA is really regulating European insurers and transactions. *See* discussion *supra* at 1-3. In addition, the justification that numerous Holocaust survivors reside in California is unavailing as this fact alone is insufficient to confer jurisdiction. A "post-occurrence change of residence" by an insurance claimant alone is not a "significant contact" adequate to support jurisdiction. *McLuney v. Jos. Schlitz Brewing Co.*, 649 F.2d 578, 583 (8th Cir.), *aff'd*, 454 U.S. 1071 (1981); *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U.S. 178, 182 (1936); *see also Order of United Commercial Travelers of*

9. Thus, the Commissioner's argument that minimum contacts analysis depends on "justifying interests" and not "motivating purposes" is irrelevant for purposes of legislative jurisdiction. Resp. Brf. at 44-45.

America v. Wolfe, 331 U.S. 586 (1947); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

II. THE HVIRA VIOLATES THE COMMERCE CLAUSE

The Commissioner asks this Court to accept the notion that there are absolutely no Commerce Clause limitations on a state's power as respects the business of insurance. Resp. Brf. at 31-33. In this regard, the Commissioner goes to great lengths to distinguish *Federal Trade Commission v. Travelers Health Ass'n.*, 362 U.S. 293 (1960). This Court, however, has unequivocally stated that, in enacting the McCarran-Ferguson Act, it was clear that Congress viewed "state regulation of insurance solely in terms of regulation by the law of the State where occurred the activity sought to be regulated. There was no indication of any thought that a State could regulate activities carried on beyond its own borders." *Id.* at 300; *see also* Brief of Gerling Companies in Support of Petitioners at 33-36.

Petitioners have never disputed California's ability to regulate insurance within the state. That indeed was the intent of the McCarran-Ferguson Act – to permit states to continue to regulate insurance after the decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). *See* Brief of Gerling Companies in Support of Petitioners at 33-36. However, the McCarran-Ferguson Act does not insulate the HVIRA from Commerce Clause restrictions where that regulation applies to insurance transactions *beyond* the state's borders. The Commerce Clause "precludes application of a state statute to commerce that takes place wholly outside of the State's borders, irrespective of whether the commerce has effects within the State." *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982); *Healy v. Beer Institute*, 491 U.S. 324, 336-37 (1989).

Pursuant to the principles enunciated by this Court in *Healy*, the HVIRA constitutes impermissible extraterritorial regulation.

First, it seeks information solely on transactions that occurred outside the State of California. *See Healy*, 491 U.S. at 336. The information sought by the HVIRA exclusively involves insurance transactions entered into in Europe between European parties under European law. In the case of the German affiliates of the Gerling Companies, the HVIRA is focused on companies wholly outside California's regulatory authority and jurisdiction.

Second, the "practical effect" of the HVIRA is to control conduct beyond California's borders. *Id.* It requires European insurers that are not subject to California's regulatory authority to take affirmative acts. The Commissioner tries to rehabilitate the HVIRA by claiming that the only effect of the statute is "informational." Resp. Brf. at 36. Seeking information, however, for the alleged purposes of making licensing decisions *is* regulation. *See Dole v. United Steelworkers of Am.*, 494 U.S. 26, 28 (1990) ("rules which require regulated entities to disclose information" are "regulatory tools available to [the] Government"). Even the Ninth Circuit recognized that "[s]eeking information from insurers about their claims-paying record to be used in the licensing process, is a form of regulating the business of insurance." App. at 84a.

The Commissioner also suggests that the HVIRA does not violate the Commerce Clause because it does not directly impose obligations on out-of-state insurers. Resp. Brf. at 36. Instead, it obligates California insurers to disclose the records maintained by their European affiliates. According to the Commissioner, the California insurers could travel to Europe and gather this information themselves. Resp. Brf. at 36. The Commissioner makes this argument notwithstanding the district court's finding that, at least in the case of the Gerling Companies, the California insurers do not have control over these records. One wonders how the Commissioner (as the regulator of California insurance) would respond if foreign companies descended on California for the purpose of gathering and exporting the in-state insurance records of California insurers.

This Court has noted that "the Commerce Clause protects against the inconsistent legislation arising from the projection of one state's regulatory scheme into the jurisdiction of another." *Healy*, 491 U.S. at 336. The HVIRA represents precisely such an attempt to project a California regulatory scheme into other jurisdictions. The HVIRA creates irreconcilable conflicts with the legitimate regulatory regimes of other jurisdictions. In its simplest terms, it requires conduct by foreign companies which is expressly prohibited under the governing laws of their home countries.

This is, perhaps, most clearly demonstrated by its direct interference with European and domestic data protection and privacy laws. The German government has conclusively determined that disclosure of the information sought by the HVIRA would violate Germany's data protection laws. ER 1182, 3131. The Commissioner wrongly asserts that the issue of whether the HVIRA violates German data protection laws is "hotly disputed." Resp. Brf. at 22, n.10. The Commissioner's own experts have essentially *conceded* that the HVIRA would require German insurers to violate German data protection laws because the information provided will be placed on a public registry pursuant to Cal. Ins. Code § 13803. *See* ER 1918, ¶ 7 (suggesting that although the information sought by the HVIRA is to be included in a publicly available registry, "the Commissioner can and shall adopt regulations that expressly prohibit improper use . . ."). The Commissioner's other expert shares the same opinion: "German law requires that personal information be transferred only to foreign countries offering equivalent data protection." ER 1572. California does not offer any data protection as it intends to place the information on a public registry.

The wholesale disclosure of personal insurance information mandated by the HVIRA is incompatible with U.S. privacy laws as well. For example, the HVIRA conflicts with the privacy provisions of the Gramm Leach Bliley Act, 15 U.S.C. § 6801,

et seq. (the "Act"). The Act prohibits insurance companies "directly or through any affiliate" from disclosing "nonpublic personal" information.[10] Although there is an exception that permits disclosure to state regulatory authorities (15 U.S.C. § 6802(e)), the Act prohibits the state regulatory authority from disclosing that information to third-parties. 15 U.S.C. § 6902. The Act provides that

> a nonaffiliated third party [such as the Commissioner] that receives from a financial institution nonpublic personal information . . . shall not disclose such information to any other person that is a nonaffiliated third party of both the financial institution and such receiving third party, unless such disclosure would be lawful if made directly to such other person by the financial institution.

15 U.S.C. § 6902(c). In the instant matter, the HVIRA requires that the Commissioner publish private information on a public registry. CAL. INS. CODE § 13803. Such disclosure would simply not be compatible with the requirements of the Act.

The HVIRA's attempt to expand California's regulatory authority beyond its borders is wholly inconsistent with the limitations imposed by the Commerce Clause. If allowed to stand, the HVIRA would create regulatory chaos. Particularly in an industry as highly regulated as insurance, it is crucial that the boundaries of authority of individual state regulators are clear. The Commerce Clause prohibits California from dictating conduct in other states and other nations.

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10. Nonpublic information is defined as personally identifiable information provided by a consumer to a financial institution, resulting from any transaction with the consumer or any services performed for the consumer, or otherwise obtained by the financial institution. 15 U.S.C. § 6009(4)(A).

III. THE HVIRA VIOLATES THE FOREIGN AFFAIRS POWER

A. The HVIRA Violates The Foreign Affairs Power Under *Zschernig*

The Commissioner defends the HVIRA as "a reporting statute" that applies only to "insurers doing business in California." Resp. Brf. at 6. As such, he argues that the HVIRA "does not raise the diplomatic concerns evident in *Zschernig*." *Id.* at 22. Furthermore, he claims that "the HVIRA does not criticize any foreign government." *Id.* at 25.

The Commissioner's claimed justification for the statute is to "protect[] California against insurance companies that . . . *might be* influenced by companies that are engaging in the widespread practice of wrongfully withholding insurance information from insureds and beneficiaries." Resp. Br. at 1. The Commissioner goes on to suggest that he has a better understanding of German law than does the German government. *Id.* at 22, n.10.

These justifications conflict sharply with the Commissioner's defenses of the statute contained in his brief. They reflect California's apparent dissatisfaction with "substantial diplomatic" efforts conducted by the United States and Germany since the end of World War II to achieve "expeditious disposition" of Holocaust insurance claims, which includes over $100 billion paid by the Federal Republic of Germany. Brief of the United States as *Amicus Curiae* (dated Feb. 2003) at 1-2; Feb. 24, 2003 *Amicus* brf. of FRG at 2. They reflect California's criticism of European (and specifically German) data protection laws that prohibit the unauthorized disclosure of personal information as required by the HVIRA. Feb. 24, 2003 *Amicus* brf. of FRG at 3-4.

The HVIRA is an attempt by the State of California to impose its own "solution" to Holocaust-era claims despite the Federal Republic of Germany's 55 years of reparations efforts and the July 17, 2000 Executive Agreement. *See* CAL. INS. CODE § 13801(e)-(f); Reply App. at 1a-5a. The HVIRA, which invariably focuses on Germany, is a clear and unmistakable criticism of German domestic law on such issues as data protection, currency valuation, insurance regulation and Holocaust reparations and compensation. In the view of the German government, "reversal of [the Ninth Circuit decisions] are necessary to enjoin the State of California's intrusion on German sovereignty and its impermissible interference with the U.S.-German Executive Agreement and the Federal Republic's ability to engage in diplomatic relations with the United States as a unitary political entity." Feb. 24, 2003, *Amicus* brf. of FRG at 13.

As reflected by the *amicus* filings of the United States, Germany and Switzerland, the HVIRA constitutes impermissible interference with the federal government's conduct of foreign affairs. *Zschernig v. Miller*, 389 U.S. 429 (1968).

B. The HVIRA Interferes With The Implementation Of The Executive Agreement

The Executive Agreement entered into by the United States and the Federal Republic of Germany was the culmination of 55 years of diplomatic efforts to resolve claims arising out of the Holocaust. The Executive Agreement resulted in the establishment of the Foundation, "Remembrance, Responsibility and the Future" ("Foundation"). It also provided for the resolution of Holocaust-era insurance claims through the "current claims handling procedures adopted by [ICHEIC]." ER 822.

On October 16, 2002, the Foundation, ICHEIC, and the German Insurance Association ("GDV") entered into the

Agreement Concerning Holocaust-era Insurance Claims (the "Agreement"). Lodg., L-70-L-89. The Agreement established claims handling procedures, valuation techniques, and created a mechanism by which the entire German insurance market would participate in the publication of relevant policyholder information. Those efforts will soon permit Holocaust victims and their heirs to "have access to the most comprehensive listing ever available of insurance policies issued to Jewish residents of Germany during the Nazi era" in a manner that does not offend Germany data protection laws.[11] The GDV was able to accomplish this breakthrough because of the promise of legal peace for German insurers contained in the Agreement. Lodg., L-147-L-151.

At the time of the signing of the Agreement, the Foundation distributed approximately $100 million to ICHEIC for payment of valid Holocaust-era insurance claims against German companies. An additional $175 million was made available to ICHEIC for humanitarian purposes. *www.icheic.org/eng/German_foundation_Agreement_Press_Advisory.pdf.*

The Agreement has received wide support, including from U.S. insurance regulators and the National Association of Insurance Commissioners ("NAIC").[12] "All parties worked hard to produce a fair agreement, which conforms to the principles the NAIC has insisted upon." *Id.* The chair of the NAIC International Holocaust Commission Task Force identified the following significant benefit afforded by the Agreement: "[b]y bringing the entire German market into this process along with the original ICHEIC companies, we've greatly expanded

11. Statement by Ambassador Randolph M. Bell to U.S. House of Representatives, Sept. 24, 2002. Lodg., L-65-L-68. *See, www.house.gov/reform/min/pdfs/pdf_com/pdf_holocaust_hearing_sept_24_bell_testimony.pdf.*

12. *See, www.naic.org/pressroom/releases/re1020902_ICHEIC_Agreement.htm.*

survivors' opportunities to see valid claims paid." *Id.* This far exceeds any imagined benefit offered by oppressive legislation such as the HVIRA (which, by its terms, only reaches European companies which are "related" to California insurers).[13]

Significantly, on December 2, 2002, Germany's federal insurance regulatory authority *(Bundesanstalt für Finanzdienstleistungsaufsicht* or *"BaFin")* issued a directive to all German life insurers requiring production of all electronically maintained policyholder lists for the period 1920 to 1945. Reply Lodging at L-4-L-12.[14] As a result, a list of approximately nine million German policyholder names from the period 1920 to 1945 has been assembled. Reply Lodging at L-2. Under the terms of the Agreement, this list is being compared with pre-War census data to create a single consolidated list of Jewish policyholders in Germany from the period at issue. On April 8, 2003, the Foundation reported: "[t]his process will be completed soon. As foreseen in our Agreement the matching result will be published on the Internet. This will

13. The arguments contained in the NAIC *amicus curiae* brief filed in support of affirmance in this matter ring particularly hollow given that organization's enthusiastic support of the Agreement and its self-proclaimed role in the establishment of ICHEIC. Brief of the National Association of Insurance Commissioners as Amicus Curiae in support of Respondent (March 2003). In the one hand, the NAIC (acting through ICHEIC) has agreed to the processes set forth in the Agreement. On the other hand, the NAIC urges this Court to affirm the constitutionality of the HVIRA. When entering into the Agreement, ICHEIC and its members (including the NAIC and the Commissioner) agreed to use their "best efforts to achieve an all embracing and enduring legal, regulatory, legislative and administrative peace for German insurance companies which are in compliance with this Agreement." Lodg. at L-83. The HVIRA clearly does not afford the bargained-for peace which is required by the Agreement.

14. References to "Reply Lodging" are to the documents contained in the Lodging filed concurrently with the Reply Brief for the Gerling Companies.

enhance the world-wide public awareness of our process considerably without violating European and German data protection laws." Reply Lodging at L-2.

More recently, by letter dated April 11, 2003, the President of BaFin informed ICHEIC Chairman Lawrence Eagleburger that compilation of this policyholder list has been completed. Reply Lodging at L-13. "The process of reconciling it with the 'Residents List' can now begin." *Id.*

The procedures embodied in the Agreement evidence the very reason why matters of foreign policy are entrusted to the federal government and not the individual states. The diplomatic efforts of the federal government have resulted in the imminent publication of a Holocaust-era policyholder list far more comprehensive than anything California could hope to achieve through the HVIRA. This has been accomplished in a manner consistent with internal European laws. This has been accomplished with the active assistance of legitimate regulatory authorities (not through the projection of California's regulations into Europe). This has also been accomplished without threatening the licenses of domestic insurers which collectively underwrite in excess of twenty percent (20%) of all property and casualty insurance policies in the State of California.[15]

The HVIRA has more than an "incidental or indirect effect in foreign countries" and poses "great potential for disruption or embarrassment" of U.S. foreign policy. As such, it impairs the federal government's foreign affairs power.

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15. *See* 2001 California Preliminary P&C Market Share Report located at the California Department of Insurance Website at *http://www.insurance.ca.gov/RRD/RSU/mktshr2001/mktshr2001.htm.*

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 02-722

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PETITIONERS

v.

JOHN GARAMENDI, INSURANCE COMMISSIONER,
STATE OF CALIFORNIA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a California statute that requires an insurance company doing business in the State to retrieve, compile, and disclose information about each insurance policy issued by that company or an affiliate in Europe that was in effect between 1920 and 1945 (1) impermissibly intrudes upon the national government's exclusive power over foreign affairs and foreign commerce or (2) regulates extraterritorially in violation of the Commerce Clause, the Due Process Clause, or both.

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INTEREST OF THE UNITED STATES

The United States has engaged in extensive diplomatic efforts to assure that the nations and enterprises responsible for the Holocaust provide some measure of justice to their victims. In so doing, the United States has consistently encouraged the use of voluntary, non-adversarial mechanisms for resolving Holocaust victims' claims. California has adopted a different approach. The State has enacted a series of related statutes, including the one challenged here, to provide a separate means of resolving those claims. Such state laws directly interfere with the national government's authority over foreign affairs and foreign commerce.

STATEMENT

1. a. Since the end of World War II, the United States has committed substantial diplomatic resources to achieving

some measure of justice for the victims of Nazism. The United States and its allies entered into treaties with the post-War governments of Germany and Austria that required them to pay compensation to such persons. See Pet. App. 97a-98a. More recently, the United States has engaged in extensive international discussions concerning claims of Holocaust victims and their heirs. As a result of those discussions, the United States has entered into executive agreements with Germany and Austria and has issued a joint statement with Switzerland.

As with Holocaust-related claims generally, the United States has sought to encourage the resolution of insurance claims of Holocaust victims and their heirs "through cooperative means outside of litigation." Office of the Spokesman, U.S. Dep't of State, *Holocaust Insurance Agreement Signed* (Oct. 17, 2002). The United States has promoted the expeditious disposition of such claims in accordance with the procedures established by the International Commission on Holocaust Era Insurance Claims (ICHEIC).

ICHEIC is a voluntary organization formed by five European insurance companies, the State of Israel, Jewish organizations, and the National Association of Insurance Commissioners. The United States has observer status in ICHEIC, as do several European countries, including Germany, France, Italy, Poland, and the Czech Republic. ICHEIC is chaired by former Secretary of State Lawrence S. Eagleburger. Through ICHEIC, Holocaust victims' insurance claims are processed and checked against European insurers' records in a manner consistent with participating insurers' concerns that they not violate European data privacy laws.

The United States has repeatedly stated that ICHEIC "should be recognized as the exclusive remedy for all insurance claims that date to the Nazi era" and has "encourag[ed] all insurance companies that wrote policies during the Nazi era to join the ICHEIC." Office of the Spokesman, U.S.

Dep't of State, *International Commission on Holocaust Era Insurance Claims Begins World-Wide Effort to Identify Unpaid Claims* (Feb. 15, 2000); see Pet. App. 177a (statement of Ambassador Randolph M. Bell, Special Envoy for Holocaust Issues) (reiterating United States' position that ICHEIC should be viewed as "the exclusive remedy for unresolved insurance claims from the National Socialist era and World War II").

b. The United States' approach to resolving Holocaust victims' claims, including insurance claims, is reflected in the executive agreement entered into between the United States and Germany in 2000. See Pet. App. 153a-168a. That agreement recognizes the creation of a foundation in Germany, funded with $5 billion from public and private sources, to address Holocaust-era claims against German companies that were not addressed by earlier measures. The German government agreed to supervise the activities of the foundation. *Id.* at 155a-156a. The United States, in turn, agreed to inform its courts that "it would be in [its] foreign policy interests * * * for the Foundation to be the exclusive remedy and forum for resolving [Holocaust-era] claims asserted against German companies." *Id.* at 156a. The United States also agreed to "use its best efforts" to promote the objectives of the agreement, including the achievement of an "all-embracing and enduring legal peace" with respect to such claims. *Ibid.*

The agreement specifically endorses ICHEIC as the proper vehicle for resolving Holocaust-era insurance claims. Germany agreed that all claims by or on behalf of Holocaust victims against German insurance companies would be processed based on ICHEIC procedures and additional proce-

dures to be agreed upon among ICHEIC, the foundation, and the German Insurance Association. Pet. App. 156a.[1]

The additional procedures recently established by ICHEIC and the German entities provide, among other things, for potential claims to be checked against insurance companies' records in a manner consistent with German privacy law. ICHEIC publishes a list that includes only the names of policyholders who are believed to have been Holocaust victims (based on information from various sources such as German census records) and those policyholders' years of birth. See *Agreement between the International Comm'n on Holocaust Era Insurance Claims, the Foundation "Remembrance, Responsibility, and the Future" and the German Ins. Ass'n* Annex H, Para. IV (Oct. 16, 2002) <http://www.icheic.org/eng/press.html>.

2. The State of California has taken a different approach to securing compensation for Holocaust victims and their families. In a series of closely related statutes, including the one challenged in this case, the State has sought to use its regulatory authority to compel resolution of Holocaust-era insurance claims.

a. The statute at issue here, the Holocaust Victim Insurance Relief Act of 1999 (HVIRA), Cal. Ins. Code §§ 13800 *et*

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[1] The executive agreement between the United States and Austria, which consists of an exchange of diplomatic notes and annexes, contains nearly identical undertakings. See *Exchange of Notes* Annex A, Para. 14 (Jan. 23, 2001) <http://www.usembassy.at/en/policy/annex_a.htm>. The joint statement of the United States and Switzerland similarly endorses ICHEIC and notes the "potentially disruptive and counterproductive effects of investigative initiatives or the threat or actual use of sanctions on a sub-federal level against insurers, including those that are * * * participants in [ICHEIC]." *Joint Statement Between the Government of the United States of America and the Government of the Swiss Confederation* (Jan. 29, 2000) <http://www.us-embassy.ch/NEWS/ jointstatement.htm>.

seq. (West Supp. 2003), requires each insurance company doing business in the State to disclose for publication detailed information concerning policies issued by the company or its affiliates in Europe decades ago. See *id.* §§ 13803, 13804. HVIRA requires disclosure of information concerning "life, property, liability, health, annuities, dowry, educational, or casualty insurance policies" that were sold "directly or through a related company, to persons in Europe, which were in effect between 1920 and 1945." *Id.* § 13804(a). As to each policy, the insurer must disclose "[t]he holder, beneficiary, and current status," the policyholder's "city of origin, domicile, or address," *id.*§ 13804(a)(1), whether the policy proceeds have been paid, *id.* § 13804(b), and, if not, the policy's value, *id.* §§ 13802(c), 13804(b). A domestic insurer is required to disclose such information about any such policies sold by its European affiliates, "whether the sale occurred before or after the insurer and the related company became related." *Id.* § 13804(a). The information is to be entered in a Holocaust Era Insurance Registry that is accessible to the public. *Id.* § 13803. The Commissioner of Insurance must suspend the license of any insurer that fails to provide the information. *Id.* § 13806.

HVIRA declares that its requirements are "necessary to protect the claims and interests of California residents," including some 5600 Holocaust survivors living in the State, and "to encourage the development of a resolution to these issues through the international process or through direct action by the State." Cal. Ins. Code § 13801(f) (West Supp. 2003). HVIRA's requirements apply to *every* insurance policy issued in Europe during the relevant period, however, without regard to whether the policyholder or the beneficiary ever resided in California.

b. In 1998, the California Legislature approved not only HVIRA, which was initially vetoed by the Governor and did

not become law until the following year,[2] but also two related measures that did become law. See Assembly Bill No. 1334, 1998 Cal. Stat. ch. 43; Senate Bill No. 1530, 1998 Cal. Stat. ch. 963.

Assembly Bill No. 1334, which was designed "to provide just compensation to aging Holocaust victims," 1998 Cal. Stat., ch. 43, § 3, authorizes suits on Holocaust-era insurance policies in California courts, Cal. Civ. Proc. Code § 354.5(b) (West Supp. 2003). It permits suits to be brought against any insurer that is "related" to the insurer that issued the policy. *Id.* § 354.5(a) and (b). It also abolishes any statute-of-limitations defense if the suit is brought by 2010, *id.* § 354.5(b) and (c), declares that forum-selection provisions in Holocaust-era policies are unenforceable, 1998 Cal. Stat., ch. 43, § 1(b), and provides that the policies, although issued in Europe, are "subject to California law," *ibid.*

Senate Bill No. 1530, in turn, directs the Commissioner of Insurance to "work to recover information and records that will strengthen the claims of California residents" with respect Holocaust-era policies by undertaking "a coordinated approach to gather, review, and analyze the archives of insurers and other archives and records." Cal. Ins. Code § 12967(a)(1) and (2) (West Supp. 2003). That measure also requires the Commissioner to suspend the license of any California insurer if it "or any affiliate * * * has failed to pay any valid claim" of Holocaust victims or their heirs,

[2] Governor Pete Wilson vetoed the original HVIRA as unnecessary and unduly broad. *Governor's Veto Message*, A.B. 1715 (Sept. 27, 1998). HVIRA was reintroduced and passed in 1999 with only minor modifications. The accompanying committee report explained that HVIRA was a necessary supplement to existing laws because it provides for dissemination of policy information to potential claimants, so that they "can take direct action on their own behalf." Gerling Appellees' C.A. Reh'g Pet., Exh. J.

whether or not the claimant is a resident of the State. *Id.* § 790.15(a) and (b)(1).[3]

3. a. Petitioners, insurers that do business in California and that have European affiliates, brought suit to challenge the constitutionality of HVIRA. The district court entered a preliminary injunction against enforcement of the statute. The court held that petitioners had shown a probability of succeeding on their claims that HVIRA impermissibly "interferes with the national government's exclusive power over external affairs," Pet. App. 95a-105a, and regulates extraterritorially in violation of the Commerce Clause, *id.* at 106a-110a.

b. The court of appeals rejected each of the constitutional grounds on which the preliminary injunction was based. Pet. App. 34a-60a. The court held that HVIRA, as an insurance regulation, is exempted from Commerce Clause scrutiny by the McCarran-Ferguson Act, 15 U.S.C. 1012(b). See Pet. App. 41a-45a. The court also suggested that HVIRA does not, in any event, regulate extraterritorially because HVIRA "requires California companies only to *provide*

[3] California has enacted other laws to assist private individuals' claims arising out of events that occurred abroad during World War II. In 1999, California enacted a statute that creates a cause of action, with uniquely favorable substantive and procedural rules, for "any Second World War slave labor victim" or "Second World War forced labor victim," or the heirs of such victim, against "any entity or successor in interest thereof for whom that labor was performed, either directly or through a subsidiary or affiliate." Cal. Civ. Proc. Code § 354.6 (West Supp. 2003). The Ninth Circuit recently struck down that statute as an impermissible intrusion into matters of international relations reserved to the national government. *Deutsch* v. *Turner Corp.*, 317 F.3d 1005 (2003); but see *Taiheiyo Cement Corp.* v. *Superior Court*, 105 Cal. App. 4th 398 (2003) (upholding statute). In 2002, California enacted a further statute that permits Holocaust victims to bring suit in California to recover looted artwork, regardless of whether the property is located in the State. See Cal. Civ. Proc. Code § 354.3.

information about" Holocaust-era policies. *Id.* at 43a. The court also held that HVIRA does not impermissibly interfere with the national government's authority over foreign affairs. *Id.* at 58a-59a. The court remanded the case for consideration of petitioners' due process claim.

4. a. On remand, the district court permanently enjoined the enforcement of HVIRA. The court held that HVIRA violates the Due Process Clause by suspending insurers' licenses for not making the required disclosures without enabling them to raise defenses such as a foreign-law prohibition on disclosure. Pet. App. 78a-83a.

b. The court of appeals reversed. Pet. App. 1a-33a. The court held that HVIRA does not violate due process constraints on state legislative jurisdiction because HVIRA merely regulates the insurance industry within California. Pet. App. 9a. The court also held that HVIRA does not violate due process by denying insurers an opportunity to defend against the suspension of their licenses. *Id.* at 20a-29a. The court reiterated its earlier holdings rejecting challenges to HVIRA under the Commerce Clause and the foreign affairs power. *Id.* at 29a.

SUMMARY OF ARGUMENT

This case arises out of an attempt by a single State to extend its regulatory authority into other nations, thereby undermining the foreign policy of the United States. California, in HVIRA, has sought to compel the disclosure of vast amounts of information contained in foreign archives concerning foreign transactions among foreign parties. It has done so for the express purpose of enabling victims of Nazi Germany to pursue claims with respect to insurance policies issued in Europe before and during the Second World War. HVIRA exceeds several distinct, but complementary, constraints that the Constitution imposes on a State's regulatory authority, all of which serve to avoid unseemly conflict

with the national government, with other States, and with other nations acting within the sphere of their own authority.

I. HVIRA impermissibly intrudes into a field—the conduct of the United States' diplomatic and commercial relations with other nations—that is exclusively reserved to the President and Congress. The national government's authority over external relations includes the authority to resolve claims arising out of, or in connection with, international conflicts. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 679-680 (1981).

California has sought in HVIRA to establish its own separate mechanisms for resolving such claims. HVIRA is specifically concerned with gathering information concerning European insurance transaction in order to facilitate claims by and on behalf of victims of Nazi Germany. Moreover, HVIRA threatens to impair the United States government's own approach to the resolution of Holocaust victims' claims —an approach that encourages the use of voluntary non-adversarial mechanisms, in contrast to coercive regulation and litigation. The United States' ability to persuade foreign governments and foreign enterprises to participate in voluntary mechanisms is undermined by state regulations such as HVIRA, which impose additional obligations on foreign enterprises, through their domestic affiliates, for the purpose of aiding the assertion of claims against those foreign enterprises in California judicial proceedings or elsewhere. Indeed, HVIRA has generated the very tension with our European allies that the United States has sought to avoid.

II. HVIRA also regulates extraterritorially in violation of both the Commerce Clause and the Due Process Clause. Those Clauses impose similar constraints on a State's ability to regulate activity that occurs outside its borders. See, *e.g.*, *Healy* v. *Beer Inst., Inc.*, 491 U.S. 324, 336 (1989); *Home Ins. Co.* v. *Dick*, 281 U.S. 397, 407-408 (1930). HVIRA compels

the retrieval, compilation, and public disclosure of information located outside the State, concerning transactions that occurred outside the State, between parties who were not residents of the State. Accordingly, even if the statute applied to policies issued in New York to New York residents, rather than to policies issued in Europe to Europeans, it would exceed the State's authority.

ARGUMENT

I. HVIRA IMPERMISSIBLY INTRUDES INTO MATTERS OF FOREIGN RELATIONS AND FOREIGN COMMERCE RESERVED TO THE NATIONAL GOVERNMENT

A. Under Our Constitutional System, The President And Congress Exercise Exclusive Authority Over Foreign Relations And Foreign Commerce

As the Court has emphasized, "[i]n international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 448 (1979); see, *e.g.*, *Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941) ("The Federal Government * * * is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties."). It necessarily follows that "[p]ower over external affairs is not shared by the States," but instead "is vested in the national government exclusively." *United States* v. *Pink*, 315 U.S. 203, 233 (1942).

The national government's preeminent role in acting for the United States in the international arena was forged out of the experience under the Articles of Confederation, when the States had undermined the national government's efforts to engage in political and commercial relations with other nations. See, *e.g.*, *Oldfield* v. *Marriott*, 51 U.S. (10 How.) 146, 163-165 (1850). The Constitution's reservation of such

powers exclusively to the national government is reflected in its express grants of power to Congress,[4] and to the President,[5] and in its express restrictions on the States.[6] Those provisions serve to set matters of foreign commerce, foreign relations, and war in a field apart. It is a field that the States may not enter.

The national government has traditionally exercised its foreign relations and war powers with respect to the resolution of private parties' claims arising out of international conflicts. See, *e.g.*, *Dames & Moore*, 453 U.S. at 679 ("[T]he United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries."); *Pink*, 315 U.S. at 240 (Frankfurter, J., concurring) ("That the President's control of foreign relations includes the settlement of claims is indisputable."); *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199, 230 (1796); *Deutsch* v. *Turner Corp.*, 317 F.3d 1005, 1025 (9th Cir. 2003) ("[T]he Constitution allocates the power over foreign affairs to the federal government exclusively, and the power to make and resolve war, including

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[4] Those include Congress's powers to "provide for the common Defence," "regulate Commerce with foreign Nations," "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," and "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." U.S. Const. Art. I, § 8, Cls. 1, 3, 10, 11.

[5] Those include the President's powers to serve as "Commander in Chief of the Army and Navy," "make Treaties" and "appoint Ambassadors [and] other public Ministers and Consuls" with the advice and consent of the Senate, and "receive Ambassadors." U.S. Const. Art. II, §§ 2, 3.

[6] Those include restrictions on the States' "enter[ing] into any Treaty, Alliance, or Confederation," "grant[ing] Letters of Marque and Reprisal," "lay[ing] any Imposts or Duties on Imports or Exports," "enter[ing] into any Agreement or Compact * * * with a foreign Power," and "engag[ing] in War." U.S. Const. Art. I, § 10.

the authority to resolve war claims, is central to the foreign affairs power in the constitutional design.").

In light of the "imperative[] * * * that federal power in the field affecting foreign relations be left entirely free from local interference," *Hines*, 312 U.S. at 63, state "regulations must give way if they impair the effective exercise of the Nation's foreign policy," *Zschernig* v. *Miller*, 389 U.S. 429, 440 (1968), or prevent the United States from "speak[ing] with one voice when regulating commercial relations with foreign governments," *Japan Line*, 441 U.S. at 449. This Court has struck down state laws that engaged a State in matters affecting the Nation's external affairs "even in [the] absence of a treaty" or an Act of Congress, *Zschernig*, 389 U.S. at 441, as inconsistent with the Constitution's assignment to the national government of the authority to conduct foreign relations or, in the commercial area, as inconsistent with the Foreign Commerce Clause. See, *e.g.*, *Japan Line*, 441 U.S. at 452-453; *Zschernig*, 389 U.S. at 436; *Chy Lung* v. *Freeman*, 92 U.S. 275, 279-281 (1875); cf. *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 381-382 n.16 (2000) (noting such cases).

B. HVIRA Regulates In An Area Exclusively Reserved To The National Government

HVIRA intrudes into the field of foreign relations reserved exclusively to the national government. This Court has repeatedly recognized that the President and Congress have the sole authority to resolve, or to establish the mechanisms to resolve, the claims of United States nationals arising out of international conflicts. See, *e.g.*, *Dames & Moore*, 453 U.S. at 679. It follows *a fortiori* that the resolution of claims of *foreign nationals* arising out of, or in connection with, an international conflict is also a matter reserved exclusively to the President and Congress. A State is without authority to pursue its own independent approach to

such claims, even if the United States and the State "share the same goals," because "[t]he fact of a common end hardly neutralizes conflicting means." *Crosby*, 530 U.S. at 379. The conflict between the means chosen by the United States and by California to resolve Holocaust victims' insurance claims is quite evident.

1. As explained above (at 1-4), with respect to still-unresolved claims against foreign enterprises arising out of the Holocaust, the United States has determined that those claims should be pursued through voluntary, non-adversarial processes rather than through coercive regulation and litigation. The United States has concluded that such an approach serves the interests of Holocaust victims and their families throughout the world, including the interests of elderly survivors of the Holocaust in obtaining some measure of justice within their lifetimes. The United States has also concluded that a non-adversarial approach serves important interests of the Nation in cooperative relations with its European allies.

More particularly, the United States, in its executive agreements with Germany and Austria and its other recent diplomatic efforts, has encouraged the use of ICHEIC as the exclusive mechanism for resolving Holocaust-era insurance claims. Those agreements do not, of their own force, extinguish any claims that Holocaust victims or their families might assert in court against foreign insurance companies.[7] They do make clear, however, that United States policy disfavors the imposition of further obligations on companies

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[7] Because the claims almost exclusively concern persons and transactions that had no relation to the United States at the time of the conduct at issue, it is understandable that the United States government did not seek to extinguish or resolve the claims under the laws or international agreements of this Nation or by coercive processes under our laws, and instead sought to promote resolution by other means.

subject to the agreements, whether through regulation or litigation, beyond the obligations contemplated by the agreements themselves. Thus, the executive agreement between the United States and Germany recognizes that it is "in the[] interests" of the two governments for the designated claims process "to be the exclusive remedy and forum for the resolution of all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II." Pet. App. 155a.

HVIRA poses a direct threat to "the effective exercise," *Zschernig*, 389 U.S. at 440, of United States policy with respect to Holocaust victims' insurance claims. HVIRA is not a law of general applicability with only an incidental effect on matters outside the State or the United States, or on the national government's ongoing efforts in the international arena. To the contrary, HVIRA imposes disclosure requirements that are applicable *only* to insurance policies issued "to persons in Europe" during the period leading up to and including the Second World War. Cal. Ins. Code § 13804 (West Supp. 2003); see 10 Barclays Cal. Code Regs. § 2278.1(a) (defining term "Europe" in HVIRA as those parts of Europe "occupied or controlled by Nazi Germany, its allies or sympathizers"). HVIRA imposes those requirements for the express purpose of assisting Holocaust victims and their families in pursuing claims with respect to those policies, whether through "international process" or through judicial proceedings or enforcement actions by the State. See Cal. Ins. Code § 13801(b) (HVIRA is intended "to encourage the development of a resolution to these issues through the international process or through direct action by the State"). California has thereby thrust itself into the field of foreign relations and foreign commerce that is reserved exclusively to Congress and the President, who "is the sole organ of the nation in its external relations, and its sole representative with foreign nations." *United States* v.

Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (quoting statement of John Marshall).

California has proceeded, moreover, in a manner that conflicts with the approach that the national government has elected to pursue. HVIRA not only requires the disclosure of Holocaust-era policy information to an entity in addition to ICHEIC, but also requires the disclosure of information substantially in addition to that required by ICHEIC. And HVIRA imposes a significant economic penalty—suspension of a license to do business—on California affiliates of insurers that fail to make those disclosures. HVIRA thus establishes "a different, state system of economic pressure," *Crosby*, 530 U.S. at 376, that conflicts with the ICHEIC system endorsed by the United States, and that threatens to impede its implementation and operation.

At a minimum, such state laws "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments." *Crosby*, 530 U.S. at 381. The United States has stated that participation in the voluntary processes that it has endorsed should "give[] those companies cooperating with [ICHEIC] 'safe haven' from sanctions, subpoenas, and hearings relative to the Holocaust period." Testimony of Stuart E. Eizenstat, Deputy Secretary of the Treasury, before the Senate Foreign Relations Committee (Apr. 5, 2000) (Pet. App. 136a); see Pet. App. 156a (United States undertakes in its agreement with Germany to "use its best efforts * * * with state and local governments" to achieve an "all-embracing and enduring legal peace"). HVIRA, however, makes no exception even for companies that participate in ICHEIC or similar organizations. Indeed, HVIRA and the related California statutes appear designed to facilitate continuing litigation. HVIRA thereby undermines the United States' ability to persuade foreign governments and foreign companies to participate voluntarily in organizations such as ICHEIC. See *Crosby*,

530 U.S. at 377 (recognizing that the President's "economic and diplomatic leverage" is reduced by state laws that seek to penalize foreign governments or foreign commerce); see also *Joint Statement Between the Government of the United States of America and the Government of the Swiss Confederation* (Jan. 29, 2000) (noting the "potentially disruptive and counterproductive effects" of laws such as HVIRA); Letter from Stuart E. Eizenstat, Deputy Secretary of the Treasury, to Gray Davis, Governor (Nov. 30, 1999) (Pet. App. 123a-125a) (observing that HVIRA could "undermine" the ICHEIC claims resolution process and "de[r]ail" negotiations between the United States and Germany concerning claims of Nazi slave and forced laborers).

The potential for HVIRA to complicate the United States' diplomatic efforts is illustrated by contrasting the information that insurers are required to disclose under the ICHEIC procedures endorsed by the United States with the information that insurers are required to disclose under HVIRA. As contemplated by the United States and Germany in their executive agreement, ICHEIC, the German foundation, and the German Insurance Association developed rules to govern what information about Holocaust-era insurance policies must be made available in order to provide adequate notice to potential claimants while safeguarding the privacy interests of other persons under German (or other European) law.[8] Those rules require the disclosure

[8] Many European countries, like California and other States, limit the disclosure of personal information obtained through commercial transactions, including insurance transactions. See, *e.g.*, Tracie B. Loring, *An Analysis of the Informational Privacy Protection Afforded by the European Union and the United States*, 37 Tex. Int'l L.J. 421, 423-425, 434-439 (2002) (describing the development of laws protecting personal information in the nations comprising the European Union). European laws have been described as more comprehensive in their protection of personal data than are laws in the United States. See *id.* at 425 ("Unlike the European Union's omnibus, centralized approach to informational privacy, which reflects the notion that data protection must be ensured by comprehensive legislation, data protection regulation in the United States is decentralized, fragmented, ad hoc, and narrowly tailored to target specific sectors."); David Bender, *Privacy Law*, 717 PLI/Pat 563, 579 (2002) ("In contrast to the piecemeal U.S. approach that relies largely on self-regulation, the European Union in 1995 adopted a data protection directive * * * that required each of the 15 member states to enact comprehensive data protection legislation.").

only of the name of any policyholder who is believed to have been a Holocaust victim and that person's year of birth. See p. 4, *supra*. Insurers are not required to provide other information, such as the value of a policy or the named beneficiary, with respect to policies issued to Holocaust victims, and are not required to provide any information about policies issued to other persons. HVIRA is not so limited. See p. 5, *supra* (information that must be disclosed under HVIRA). Thus, whereas the United States' diplomatic efforts have sought to resolve Holocaust victims' claims while accommodating the interests of Germany and other nations to minimize conflict with European privacy laws, HVIRA strikes a different balance that fails to account for those interests.[9]

[9] As this Court has recognized, when information is sought in the United States from a foreign individual or entity, the data privacy statutes of the foreign party's own government are not controlling. See *Societe Nationale Industrielle Aerospatiale* v. *United States District Court*, 482 U.S. 522, 544-545 n.29 (1987); *Societe Internationale Pour Participations Industrielles Et Commerciales* v. *Rogers*, 357 U.S. 197, 204-206 (1958). Thus, for example, a foreign "blocking" statute does "not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute." *Aerospatiale*, 482 U.S. at 544 n.29. Here, in contrast, the constitutional deficiency in HVIRA is not merely that it imposes disclosure obligations on foreign insurers that may conflict with their *own governments'* privacy laws, but rather that it conflicts with the *United States government's* approach to the resolution of Holocaust victims'

HVIRA has generated the very tensions in international relations that the United States has sought to avoid, prompting protests from the governments of Germany and Switzerland concerning HVIRA's application to insurance policies written in those countries. See *Zschernig*, 389 U.S. at 437 n.7 (relying on similar protests to conclude that state statute impermissibly interfered with national government's authority over foreign affairs); cf. *Crosby*, 530 U.S. at 382-384. It is not for respondents to trivialize the potential implications of those protests for United States foreign policy (see Supp. Br. in Opp. 2), especially at a time of international tension when relations between this Nation and its European allies are at their most sensitive. State government officials, who are not part of the process through which the Nation formulates and conducts its international relations, are not well positioned to evaluate what adverse impact their actions may have for those relations. They cannot, for example, be expected to make an informed assessment of whether, or how, or when a foreign government might respond to provocative state legislation, or how detrimental the response might be to various important interests of the United States as a whole. "Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government." *Zschernig*, 389 U.S. at 441.

The proliferation of laws in California and other States that seek to facilitate claims against the United States' current allies or their citizens arising out of past international conflicts (see, *e.g.*, note 3, *supra*) demonstrates the danger of allowing States, which are not simultaneously dealing with foreign governments on many other important initiatives, to

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claims against those insurers, an approach that is itself more deferential to European privacy concerns.

pursue their own foreign policies. As the Court recently reaffirmed, the Framers were determined that, because "[t]he union will undoubtedly be answerable to foreign powers for the conduct of its members," "the peace of the WHOLE ought not to be left at the disposal of a PART." *Crosby*, 530 U.S. at 381-382 n.16 (quoting The Federalist No. 80, at 535-536 (Alexander Hamilton) (J. Cooke ed., 1961)).

2. The court of appeals erred in refusing, based on a misunderstanding of *Barclays Bank PLC* v. *Franchise Tax Board*, 512 U.S. 298 (1994), to consider the Executive Branch's views regarding HVIRA's foreign policy ramifications. See Pet. App. 55a. As this Court has explained, *Barclays* addressed an unusual situation in which Congress and the Executive had taken divergent positions. See *Crosby*, 530 U.S. at 385-386; *Barclays*, 512 U.S. at 324-330. *Crosby* reaffirms the central importance in other situations of the President's views in exercising his constitutional responsibility "to speak for the Nation with one voice in dealing with other governments." 530 U.S. at 381, 385-386.

Contrary to the view of the court of appeals (see Pet. App. 47a-50a), the U.S. Holocaust Assets Commission Act of 1998, Pub. L. No. 105-186, 112 Stat. 611, does not authorize States to enact statutes such as HVIRA. That Act, in fact, confirms that California has departed from the course charted by the United States. As relevant here, the Act established a "Presidential Advisory Commission on Holocaust Assets in the United States" to investigate the disposition of certain Holocaust-era assets that "came into the possession or control of the Federal Government" after January 30, 1933. *Id.* §§ 2(a) and 3(a)(1), 112 Stat. 611, 612. The Act, among other things, directed the Commission to "encourage the National Association of Insurance Commissioners to prepare a report on the Holocaust-related claims practices of all insurance companies, both domestic and foreign, doing business in the United States at any time after January 30, 1933," that

issued an insurance policy to "any individual on any list of Holocaust victims." *Id.* § 3(a)(4)(A), 112 Stat. 613.

Nothing in the federal Act imposes disclosure obligations on insurers under threat of sanctions. Nor does the Act confer any authority on the States to do so. To the contrary, the Act contemplates the gathering of information only "to the degree [it] is available." Pub. L. No. 105-186, § 3(a)(4)(B), 112 Stat. 613, 614. Moreover, unlike HVIRA, which is explicitly directed at facilitating individual claims against European insurers, the federal Act is concerned, among other things, with collecting information on "the Holocaust-related *claims practices*" of insurers "doing business in the United States," to assist the Commission in preparing a report to the President containing "recommendations for such legislative, administrative, or other action as it deems necessary or appropriate." *Id.* § 3(a)(4)(A) and 3(d)(1), 112 Stat. 613, 614 (emphasis added). And, whereas HVIRA seeks specific information about each policy issued by each European insurer during the relevant period, the federal Act seeks more general information, such as "[t]he number of policies issued by each company" to Holocaust victims. *Id.* § 3(a)(4)(B), 112 Stat. 613. Although the federal Act does seek information on the value of each such policy, it does not require the policyholder or beneficiary to be identified. It thus does not present the same privacy concerns as does HVIRA.[10]

[10] The federal Commission's final report does not disclose any private information regarding the insurance policies issued by European insurers to Holocaust victims. To the contrary, the report discusses such policies only in general terms, such as by describing the ways in which Nazi regimes confiscated the insurance assets of Holocaust victims. See Presidential Advisory Comm'n on Holocaust Assets in the United States, *Plunder and Restitution: The U.S. and Holocaust Victims' Assets* SR-15 (Dec. 2000) (Nazis "confiscat[ed] insurance monies" of "Jews fleeing Germany"); *id.* at SR-17 (Nazis "confiscat[ed] payments from insurers that were intended to compensate property owners for their damages" from the Kristallnacht pogrom). Nor does the report recommend any legislative or administrative action with respect to such insurance policies.

Thus, the federal Act takes a deliberately cautious approach, seeking to gather available information and to produce recommendations *for the President* as to what further measures might be appropriate. It provides no authority for California to pursue its own foreign policy, inconsistent with that pursued by the President, with respect to the resolution of claims under insurance policies issued by European companies to European individuals who became victims of the Holocaust.

II. HVIRA VIOLATES CONSTITUTIONAL PROHIBITIONS ON EXTRATERRITORIAL STATE REGULATION

Both the Commerce Clause and the Due Process Clause of the Fourteenth Amendment prohibit a State from regulating activity outside its borders. HVIRA is such an extraterritorial regulation. HVIRA focuses exclusively on transactions that occurred in Europe between Europeans many decades ago. It compels the disclosure of extensive private information about those transactions, even though they have "no jurisdictionally-significant relationship to [the State]." *Gerling Global Reinsurance Corp. of Am.* v. *Gallagher*, 267 F.3d 1228, 1238 (11th Cir. 2001). A State may not project its regulatory authority into other Nations in this fashion.

A. The Commerce Clause And The Due Process Clause Prohibit States From Regulating Transactions Outside Their Borders

1. Under familiar Commerce Clause principles, California may not require corporations to adhere to its standards in other States or nations as a condition of doing business in California. The Commerce Clause "precludes the application

of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy* v. *Beer Inst., Inc.*, 491 U.S. 324, 336 (1989); see *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 572 (1996) ("[I]t follows from the[] principles of state sovereignty and comity" reflected in, *inter alia*, the Commerce Clause that "a State may not impose economic sanctions on violators of its laws with the intent of changing the [violator's] lawful conduct in other States."). A state law does not cease to be impermissibly "extraterritorial" under the Commerce Clause merely because it has some nexus to domestic persons or activities. "The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." *Healy*, 491 U.S. at 336; accord, *e.g.*, *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 583 (1986).

The Court's decision in *Healy* is illustrative. There, the Court struck down a Connecticut statute that required beer distributors, as a condition of doing business in the State, to file monthly statements with state authorities affirming that their prices in Connecticut did not exceed their prices in any neighboring State. 491 U.S. at 328 & n.5. The statute did not, by its terms, require or prohibit any conduct outside Connecticut. The Court nonetheless recognized that the "practical effect" of the statute was to constrain the distributors' ability to adjust their prices in other States in response to local market conditions. See *id.* at 337-339. Accordingly, the Court held that the statute was an impermissible extraterritorial regulation of commerce. *Id.* at 340.

The Commerce Clause's prohibition on a State's regulation of conduct beyond its borders protects against "inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Healy*, 491 U.S. at 336-337. When, as here, a State seeks to project its regulatory regime not merely beyond its own

borders, but into the jurisdiction of another nation, the potential is particularly great for inconsistent legislation and resulting conflict, as well as for interference with United States foreign policy. Cf. *Japan Line*, 441 U.S. at 447-449 (noting that a state tax on instrumentalities of foreign commerce poses special concerns under the Commerce Clause because, unlike in the domestic context, no authoritative tribunal exists to assure that such instrumentalities are not subject to double taxation). Indeed, even Acts of Congress are presumed not to apply extraterritorially, unless Congress clearly indicates otherwise, to "protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

2. A State is also constrained by the Due Process Clause from regulating transactions that do not have a significant relationship to its legitimate interests. See, *e.g.*, *BMW*, 517 U.S. at 568-574; *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 818-819 (1985); *Home Ins. Co.* v. *Dick*, 281 U.S. 397, 407-408 (1930).

In *Dick*, for example, the Court held that a Texas insurance statute could not, consistent with due process, be applied to invalidate a provision contained in a policy that had been issued in Mexico and was to be performed there. See 281 U.S. at 408. The Court explained that, because all acts relating to the making and performance of the policy occurred outside the State, "Texas was therefore without power to affect the terms of contracts so made." *Ibid.*; see *id.* at 408 n.5 ("[A] State is without power to impose either public or private obligations on contracts made outside of the state and not to be performed there."); see also *Shutts*, 472 U.S. at 821 (a State cannot apply its own law to "a transaction with little or no relationship to the [State]"). Similarly, in *BMW*, the Court held that a state court could not, consistent with due process, impose punitive damages de-

signed to punish conduct that occurred in other States. The Court explained that a State "would be infringing on the policy choices of other States" by penalizing "conduct that was lawful where it occurred and that had no impact on [the State] or its residents." 517 U.S. at 572-573.

Those cases make clear a State cannot apply its law to an out-of-state transaction simply because a party to the transaction resides within the State. Indeed, the policyholder in *Dick* was a citizen and permanent resident of Texas, although all conduct relevant to the policy had occurred in Mexico. The Court held that Texas did not have a sufficient relationship to the policy to permit the State to regulate it. See 281 U.S. at 408. And, in *Shutts*, the Court held that Kansas could not apply its law to out-of-state plaintiffs' claims with respect to out-of-state leases, even though the defendant did business in the State. See 472 U.S. at 818-819.

B. HVIRA, By Imposing Disclosure Requirements Exclusively With Respect To Foreign Transactions Between Foreign Parties, Is An Impermissible Extraterritorial Regulation

1. Whether analyzed under the Commerce Clause or the Due Process Clause, HVIRA is an impermissible extraterritorial regulation. Its "practical effect" is to compel "conduct beyond the boundaries of the State," *Healy*, 491 U.S. at 336—specifically, to compel the retrieval, compilation, and public disclosure of detailed information, presumably located in Europe, concerning transactions that occurred many decades ago in Europe between European parties. There is no nexus between those transactions and any legitimate interest of California that would permit the State to exercise regulatory authority over them.

As noted above (at 14), HVIRA is not a generally applicable law that focuses on domestic matters and simply happens to have an extraterritorial effect in certain applications. Cf.

Japan Line, *supra* (invalidating local taxing laws even in that situation when they interfered with the Nation's ability to speak with one voice). Rather, HVIRA is *specifically and exclusively* directed at transactions that occurred in Europe. It is thus especially evident that HVIRA exceeds the proper legislative jurisdiction of the State. Indeed, HVIRA is inconsistent with California's own general privacy rules, which prohibit, with respect to insurance policies issued in California, the same sorts of disclosures that HVIRA mandates with respect to European policies. See Cal. Ins. Code § 791.13 (West 1993).

The conclusion that HVIRA is an unconstitutional exterritorial regulation is confirmed by "considering how [such laws] may interact with the legitimate regulatory regimes of other States" and nations. *Healy*, 491 U.S. at 336 (noting relevance of such an inquiry); cf. *BMW*, 517 U.S. at 572 (a State cannot "attempt[] to alter [a business's] nationwide policy" in a manner that "infring[es] on the policy choices of other States"). It is plain that HVIRA has the potential to interfere with other jurisdictions' laws limiting the disclosure of personal information gathered in connection with the issuance of insurance policies. See note 8, *supra* (discussing European data privacy laws). German officials have, in fact, opined that a German insurer would violate German privacy laws by complying with HVIRA, at least with respect to the disclosure of information about policyholders who are not believed to be Holocaust victims. See Gerling Appellees' C.A. Reh'g Pet., Exh. C. Yet, as the court of appeals recognized, an insurer that fails to disclose the information required by HVIRA will have its California license suspended, even if "disclosure pursuant to HVIRA [would] violate[] European data protection laws." Pet. App. 25a.

2. a. The court of appeals suggested that HVIRA does not regulate extraterritorially because it does "not seek to regu-

late the substance of out-of-state transactions." Pet. App. 15a (addressing due process challenge); accord *id.* at 43a (addressing Commerce Clause challenge). In the court's view, HVIRA is constitutional because it "requires California insurers *only to disclose information about* their foreign transactions or those of their affiliates." *Id.* at 16a.

The court of appeals' reasoning rests on the erroneous premise that "[a] request for information is simply not equivalent" to a regulation. Pet. App. 16a. A requirement that a person disclose, or refrain from disclosing, confidential information is regulatory in nature. It imposes a substantive obligation, the violation of which carries adverse consequences, in order to advance a government policy objective. See *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 28 (1990) (describing "rules which require regulated entities to disclose information" as "[a]mong the regulatory tools available to [the] Government"); see also *BMW*, 517 U.S. at 571 n.15 ("Federal disclosure requirements are, of course, a familiar part of our law.") (citing examples). Indeed, when the Court explained in *BMW* that "no single State could * * * impose its own policy choice on neighboring States," the Court was referring to a State's policy choice "requiring full *disclosure* of every presale repair to a car." 517 U.S. at 570-571 (emphasis added); see *Gallagher*, 267 F.3d at 1238 (observing that the disclosure provisions of Florida's version of HVIRA "pertain to, and as a practical matter unquestionably seek to regulate," Holocaust-era policies). Indeed, the regulatory nature of HVIRA's disclosure requirements is underscored by the substantive and regulatory nature of the converse interest in protecting privacy. The existence of data privacy laws, such as the European laws invoked by petitioners here, belies any claim that laws governing disclosure or non-disclosure of information do not regulate or implicate the Commerce Clause and the Due Process Clause.

b. The court of appeals also suggested that HVIRA is constitutionally justified by the State's purpose to "protect[] its residents from insurance companies that have not paid valid claims." Pet. App. 16a. A State cannot evade constitutional limits on extraterritorial legislation merely by deeming a corporation's conduct outside the State relevant to its ability to perform within the State. See *BMW*, 517 U.S. at 573-574 (State cannot base punitive damages award on conduct that is lawful in other jurisdictions); see generally *Healy*, 491 U.S. at 336 ("[A] statute that directly controls commerce occurring wholly outside the boundaries of a State * * * is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature."); *id.* at 337 n.14 (noting that *only* a statute that "regulates evenhandedly" and "has only indirect effects on interstate commerce" may be justified by a sufficiently important state interest).

In any event, the express purpose of HVIRA is to facilitate the resolution of claims on policies issued in Europe more than 50 years ago rather than to assess the fitness of insurers to do business in California today. See Cal. Ins. Code § 13801(d) and (e) (West Supp. 2003) (HVIRA is designed "to ensure the rapid resolution of * * * questions" concerning "insurance policies held by Holocaust victims and survivors," so as to "eliminat[e] the further victimization of these policyholders and their families"). By contrast, HVIRA makes no mention of the purpose that the court posited. Nor do any other features of HVIRA suggest that its purpose or primary operative effect is to enable the Commissioner of Insurance to ascertain whether an insurance company will deal fairly with California consumers. See *BMW*, 517 U.S. at 572 (state regulation "must be supported by the State's interest in protecting its own consumers and its own economy"). The information that HVIRA requires insurers to disclose is too remote, too dated, and, at the same

time, too detailed to support the court of appeals' posited purpose. The disclosure obligation is tailored to enable individuals—only a small fraction of whom may even now have any connection at all to California—to pursue claims under policies issued in Europe many decades ago. It is not tailored to assessing insurers' current performance in the State.

Indeed, state statutes in effect at the time of HVIRA's enactment already provided the Commissioner of Insurance with all of the tools necessary to investigate insurers' business practices. Cal. Ins. Code § 717(h) (West 1993) (providing Commissioner with the authority to gather information to assess the "fairness and honesty of methods of doing business" of any insurer seeking to do business in the State); *id.* § 733 (authority to examine "all [the insurer's] affairs"); *id.* § 1215.6 (authority to obtain documents in possession of "the insurer or its affiliates"). HVIRA was described by its supporters *not* as a means of obtaining information needed by the Commissioner, but as a means of obtaining information needed by individual claimants. See note 2 *supra*.

c. Contrary to the court of appeals' holding, the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*, does not immunize HVIRA from scrutiny under the Commerce Clause. The McCarran-Ferguson Act provides no authority for a State to extend its regulation of insurance into other States or nations.

The McCarran-Ferguson Act was enacted in response to this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), which held that insurance is "commerce," with the consequence that the States' ability to regulate insurance was circumscribed by the Commerce Clause. See *United States Dep't of the Treasury* v. *Fabe*, 508 U.S. 491, 499-500 (1993). Congress, however, viewed insurance as "a *local matter*, to be subject to and regulated by the laws of the several States." H.R. Rep. No.

143, 79th Cong., 1st Sess. 2 (1945). Thus, Congress enacted the McCarran-Ferguson Act to ensure that the States would continue to have primary responsibility for regulating insurance and that state laws regulating and taxing insurance would be preempted only when Congress stated a clear intent to do so. See *Fabe*, 508 U.S. at 500, 507.

The McCarran-Ferguson Act removes Commerce Clause limitations *only* with respect to a State's regulation and taxation of the insurance business within its own borders. This Court held in *FTC* v. *Travelers Health Ass'n*, 362 U.S. 293, 301 (1960), that the Act was not intended to authorize state regulation of extraterritorial activities. The Court explained that Congress "viewed state regulation of insurance solely in terms of regulation by the law of the State where occurred the activity sought to be regulated." *Id.* at 300. The Court reasoned that a contrary construction of the Act would raise serious constitutional questions, *id.* at 302, and undermine Congress's "basic motivating policy" of leaving the regulation of insurance to those "in close proximity to" the people and policies regulated, *id.* at 301-302.[11]

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[11] The Court was specifically concerned in *Travelers* with an exception to the McCarran-Ferguson Act that, among other things, allows the Federal Trade Commission to regulate insurance to the extent that it is not regulated by state law. See 15 U.S.C. 1012(b). The Court's reasoning applies equally, however, to the Act's general rule that authorizes state regulation of insurance. See 15 U.S.C. 1012(a). The two provisions are complementary. The general rule is that "[t]he business of insurance" is "subject to the laws of the * * * States which relate to the regulation * * * of such business." 15 U.S.C. 1012(a). The exception provides that the Federal Trade Commission Act, among other Acts, "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." 15 U.S.C. 1012(b). Under Section 1012(b), the Federal Trade Commission Act applies *unless* the aspect of the insurance business at issue is already regulated by the State as contemplated in Section 1012(a). As *Travelers* makes clear, extraterritorial state regulation is not within the authority delegated to the States by Section 1012(a).

Finally, whatever the extent to which the McCarran-Ferguson Act immunizes state insurance regulations from scrutiny under the Commerce Clause, the Act provides no immunity from other constitutional provisions, including the Due Process Clause. See *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 305 (1992). Accordingly, even if the Act were understood to provide a Commerce Clause immunity for extraterritorial state regulation of insurance, HVIRA would nonetheless be invalid as exceeding the Due Process Clause's independent limitations on a State's authority "to impose * * * obligations on contracts made outside of the State and not to be performed there." *Dick*, 281 U.S. at 408 n.5.

CONCLUSION

The judgment of the court of appeals should be reversed.

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No. 02-722

IN THE

Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, ET AL.,
Petitioners,

v.

JOHN GARAMENDI, IN HIS CAPACITY AS COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF MITSUBISHI MATERIALS CORPORATION ET AL. FOR LEAVE TO FILE AND BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF MITSUBISHI MATERIALS CORPORATION ET AL. FOR LEAVE TO FILE A BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

Mitsubishi Materials Corporation, Mitsubishi Materials U.S.A. Corporation, Irvine Scientific Sales Co., Inc., Ishihara Sangyo Kaisha Ltd., Ishikawajima-Harima Heavy Industries Co., Ltd., IHI, Inc., Japan Energy Corporation, Japan Energy U.S.A., Mitsubishi Corporation, Mitsubishi International Corporation, Mitsui & Co., Ltd., Mitsui & Co. (U.S.A.), Inc., Mitsui Engineering and Shipbuilding Co., Ltd., Mitsui O.S.K. Lines, Ltd., Nippon Steel Corporation, and Nippon

Steel U.S.A., Inc., move, pursuant to Rule 37.2, for leave to file the attached brief *amici curiae* in support of petitioners in this case. While the petitioners have consented to the filing of this brief, respondent Insurance Commissioner John Garamendi has not consented. Correspondence reflecting the consent of the petitioners has been lodged with the Court.

Mitsubishi Materials Corporation is a Japanese corporation that produces a variety of products, including cement, aluminum beverage cans, copper, and electronic components. Mitsubishi Materials U.S.A. Corporation, a California corporation, is a wholly owned subsidiary of Mitsubishi Materials Corporation. Mitsubishi Materials U.S.A. Corporation is primarily engaged in the sale of fabricated metal products, machine tools and accessories, and cutting tools in the United States and Canada.

Ishihara Sangyo Kaisha Ltd. is a Japanese corporation engaged in the production and marketing of industrial chemicals, including primarily titanium dioxide pigments, and biosciences products.

Ishikawajima-Harima Heavy Industries Co., Ltd., is a Japanese corporation that provides technology-oriented products and services to the industrial, private, and public sectors, including manufacturing equipment, bridge construction, and environmental control systems. IHI, Inc., a Delaware corporation, is a wholly owned subsidiary of Ishikawajima-Harima Heavy Industries Co., Ltd. IHI, Inc. is engaged in sales and repair services related to Ishikawajima-Harima Heavy Industries Co., Ltd.'s products.

Japan Energy Corporation is a Japanese corporation, which is engaged primarily in the business of refining and processing petroleum, and the sale of petroleum products and electronic materials. Irvine Scientific Sales Co., Inc. is a California corporation and is a wholly owned subsidiary of Japan Energy Corporation. Its main business is manufacturing and selling cell culture products and cytogenetics and diagnostic products. Japan Energy U.S.A. is a Delaware corporation and a wholly owned subsidiary of Japan Energy Corporation. It is currently not engaged in any particular business.

Mitsubishi Corporation is a Japanese corporation which, as a general trading company, is engaged in a diversified range of businesses, including information technology, energy, metals, machinery, chemicals, food, textiles, clothing, lumber and paper. Mitsubishi International Corporation is a wholly owned subsidiary of Mitsubishi Corporation, a New York corporation. It too is a general trading company; its primary businesses are international trade involving commodities, consumer and industrial products; project management; and strategic finance and investment.

Mitsui & Co., Ltd. is a Japanese corporation. Mitsui & Co. (U.S.A.), Inc. is a New York corporation and a wholly owned subsidiary of Mitsui & Co., Ltd. Mitsui & Co., Ltd. and Mitsui & Co. (U.S.A.), Inc. are international trading companies and providers of business services.

Mitsui Engineering and Shipbuilding Co., Ltd. is a Japanese corporation engaged mainly in the business of designing, engineering, and manufacturing of ships, oceanographic equipment, steel structures, machinery, chemical and industrial facilities.

Mitsui O.S.K. Lines, Ltd. is a Japanese corporation that provides ocean and other transportation worldwide.

Nippon Steel Corporation is a Japanese corporation having its principal place of business in Tokyo, Japan. Nippon Steel U.S.A., Inc. is a Delaware corporation having its principal place of business in New York, and is a wholly owned subsidiary of Nippon Steel Corporation.

These companies have a vital interest in this case. Collectively, the companies are defending dozens of lawsuits brought pursuant to a California statute, Cal. Civ. Proc. Code § 354.6 ("Section 354.6"), that is part of the same broad statutory scheme by which California seeks to regulate the resolution of claims arising out of World War II, and which includes the insurance regulation at issue in this case, the Holocaust Victim Insurance Relief Act of 1999 ("HVIRA"), Cal. Ins. Code § 13800 *et seq.*. The constitutionality of Section 354.6 – which creates a cause of action for persons seeking damages for forced and slave labor during World War II – has been evaluated on many of the same bases as the HVIRA, with the Ninth Circuit recently holding Section 354.6 to be an unconstitutional infringement of the United States' exclusive power over war claims and the field of foreign affairs. Thus, the decision in this case may affect the litigation of claims premised on Section 354.6. Because of the importance of these issues to each of the companies, they seek leave to file this brief *amici curiae* in order to assist the Court in its consideration of the issues in this case.

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BRIEF OF MITSUBISHI MATERIAL CORPORATION ET AL. AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Mitsubishi Materials Corporation, Mitsubishi Materials U.S.A. Corporation, Ishihara Sangyo Kaisha Ltd., Ishikawajima-Harima Heavy Industries Co., Ltd., IHI, Inc., Japan Energy Corporation, Irvine Scientific Sales Co., Inc., Japan Energy U.S.A., Mitsubishi Corporation, Mitsubishi International Corporation, Mitsui & Co., Ltd., Mitsui & Co. (U.S.A.), Inc., Mitsui Engineering and Shipbuilding Co., Ltd., Mitsui O.S.K. Lines, Ltd., Nippon Steel Corporation, and Nippon Steel U.S.A., Inc. respectfully submit this brief *amici curiae* in support of the petitioners in this case.[1]

INTEREST OF AMICI CURIAE

The interest of *amici curiae* is set forth in the foregoing Motion for Leave to File.

SUMMARY OF ARGUMENT

1. California's Holocaust Victim Insurance Relief Act of 1999 ("HVIRA") is part of a broad effort by the State of California to inject itself into U.S. foreign policy. Specifically, the HVIRA is part of a scheme to force the settlement of claims against allegedly unpaid insurance policies issued by European insurers to Europeans in the years leading up to and including World War II. California enacted this scheme in direct contravention of the express wishes of the United States and despite the federal government's pursuit of a ne-

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any petitioner or respondent authored this brief in whole or in part. No person or entity, other than *amici curiae*, made a monetary contribution to the preparation or submission of this brief.

gotiated resolution of such claims through an international commission.

Rather than working to resolve World War II claims through that commission, California proceeded to enact legislation creating *new* state-law claims, disregarding the danger that such claims might prompt companies to cease participating in the federally sponsored international commission. California's legislative effort ultimately encompassed several related measures, which collectively authorized persons to bring their time-barred World War II insurance claims, and established a system – including the public disclosure requirement directly at issue in this case – to compile the information to facilitate such claims. California eventually broadened the scheme by passing a companion statute creating a state-law cause of action for former U.S. prisoners of war and others subjected to forced labor during World War II.

The various provisions of these California efforts have generated much litigation. Courts have approached these cases in a variety of ways, most often concluding that the provisions are invalid.

2. California's statutory scheme violates the foreign affairs doctrine. It is well settled that States have no right to interfere with federal authority in the area of foreign affairs. State laws that do so disrupt the ability of the federal government to conduct foreign relations. Permitting California to enforce its insurance regulation – which regulates foreign insurance companies and does so as part of a broader effort to create causes of action against foreign corporations – would have the same undesirable effects on U.S. foreign policy that this Court held unconstitutional in cases such as *Zschernig v. Miller*.

California's comprehensive World War II legislative scheme, as well as the equally intrusive conduct of other

state and local governments in other areas of foreign affairs, demonstrates the need for this Court to reaffirm that the foreign affairs doctrine remains a vital constitutional principle. A clear statement by this Court as to how the *Zschernig* doctrine applies to statutes like the insurance regulation at issue and to related statutes, such as the cause of action provisions of the California scheme, would be of immeasurable assistance to those currently immersed in litigation brought about by California's World War II legislation.

3. The California scheme also violates principles of due process. It violates the fundamental prohibition against States' regulating conduct outside their borders. California has no connection with the underlying conduct it is seeking to regulate, which occurred in foreign countries by foreign nationals with no connection to California during the relevant time period. At no time prior to the enactment of California's scheme could any of the parties have foreseen that California law might govern any claims arising from their conduct.

4. No matter how the Court decides this case, it should be aware of the potential implications its decision might have for challenges to other, arguably more egregious provisions of the scheme. While a ruling in this case that the HVIRA is unconstitutional would almost surely invalidate the other provisions of the scheme *a fortiori*, those other provisions are, as the Ninth Circuit recently recognized, unconstitutional regardless of the outcome in this case.

Of course, the substantive merit of challenges to these other provisions is not before the Court here. However, because the decision in this case will be relied upon by courts and counsel litigating the constitutionality of these other, related California statutes, the Court should be aware of these cause-of-action-creating provisions in determining how to resolve the constitutional challenges to the HVIRA.

ARGUMENT

I. CALIFORNIA'S HOLOCAUST VICTIM INSURANCE RELIEF ACT IS PART OF A BROAD EFFORT BY STATES TO INJECT THEMSELVES INTO UNITED STATES FOREIGN POLICY.

A. The California Legislative Scheme.

In 1997, California launched its efforts to resolve claims arising from World War II. California was concerned about the issue of unpaid insurance claims discovered "in the course of researching Holocaust claims to European bank deposits."[2] S. Rules Comm., A.B. 600, Reg. Sess., at 3 (Cal. Sept. 2, 1999).

From the time the issue of unpaid insurance claims first arose, the United States advocated formal, mediated negotiations between the interested parties under the auspices of an international commission. The State Department believed

[2] California's decision to revive and enforce insurance claims for wholly foreign conduct arose initially out of private lawsuits asserting direct injury from the confiscation of assets by the government of Nazi Germany. These lawsuits – and subsequent congressional hearings and eventual settlement – opened the floodgates to numerous lawsuits asserting claims arising of actions taken by companies under the control of Nazi Germany and its allies during World War II.

Plaintiffs' lawyers supplemented their litigation efforts with equally vigorous efforts in legislative halls, lobbying state legislatures to create a variety of different statutory mechanisms for resurrecting and recovering on old claims against the distant corporate ancestors of today's deep pocket corporations. These lobbying efforts were particularly successful in California. Indeed, one of the main authors of the statute directly at issue in this case was a plaintiffs' lawyer, who crafted the legislation to eliminate some of the glaring problems with her cases. In these cases, counsel sought relief for torts committed over 50 years earlier in foreign countries with no connection to the state court venues in which she was bringing the claims. *See* Tom Tugend, *Slave Labor Bill Passed*, JEWISH J. OF GREATER L.A., July 23-29, 1999 (S.B. 1245).

that such a commission was the best way to balance its dual goals of "justice for Holocaust survivors and trying to avoid foreign policy tensions if sanctions are exercised against major [European-based] insurers." Henry Weinstein, *Hope Raised for Holocaust Claim Payouts*, L.A. TIMES, Apr. 14, 1999, at A3 [hereinafter Weinstein, *Hope Raised*] (quoting Undersecretary of State Stuart E. Eizenstat) (A.B. 600).[3]

The international commission was finally organized on August 25, 1998. *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 353 (S.D.N.Y. 2002). Its purpose was to find a means of resolving all disputed insurance claims arising out of the Holocaust. *Id.* In October 1998, former Secretary of State Lawrence S. Eagleburger was chosen to chair the commission. "The 13-member commission is composed of representatives of the Israeli government, several Jewish organizations, several state insurance commissioners, including California Insurance Commissioner Chuck Quackenbush, and representatives of six European insurance companies that have been sued by Holocaust survivors and the heirs of Holocaust victims." *Holocaust Claims Panel Picks Leader*, L.A. TIMES, Oct. 22, 1998 (A.B. 1715).

Although California was a key participant in the international commission – sponsored by the United States, Germany, and others – it never fully supported the commission's mission. *See* Henry Weinstein, *5 Holocaust Survivors Sue German Firm Over Slave Labor*, L.A. TIMES, Mar. 6, 1999, at A15 (S.B. 1245) (noting that one of the insurance scheme's sponsors and coauthors, state Sen. Tom Hayden, "gave a critical review of the performance thus far of an in-

[3] Each of the newspaper articles cited herein are articles located in the legislative bill files of A.B. 1715 (1998), A.B. 600 (1999), and S.B. 1245 (1999). The applicable bill number is parenthetically indicated after each article, as above.

ternational commission that was created last year in an attempt to resolve the controversy over Holocaust-era insurance claims"); Weinstein, *Hope Raised*, *supra*, at A3 (describing constant "tensions between state and federal officials . . . over how best to reach agreements between Holocaust survivors and Swiss banks and German corporations").

Rather than work to *resolve* asserted World War II claims through the commission, California adopted the strategy of passing legislation creating *new* claims against insurance companies and others who had done business with the Nazi regime. The State Department objected to the legislation on the ground that it was incompatible with the federal policy for addressing these issues, but it was enacted nonetheless. *See* Letter from Tom Hayden, Cal. Sen., to Stuart Eizenstat, Undersecretary of State (June 3, 1999) (noting the State Department's criticism and expressing disagreement with the federal government's position). Ultimately, California enacted the insurance claims legislation notwithstanding concerns that the new laws "might prompt companies to cease their participation in the [federally supported international] commission process, thus possibly further delaying payments to elderly Holocaust survivors." Weinstein, *Hope Raised*, *supra*, at A3.

The legislative effort undertaken in California was designed to rival the scheme advocated by the federal government. The several measures collectively purport to provide a cause of action for insurance claims that could be filed through 2010, and establish a system by which plaintiffs would be able to compile the information necessary to facilitate the assertion of such claims.[4] *See* A.B. 1334, 1998 Assemb., Reg. Sess. (Cal. 1998); A.B. 1715, 1998 Assemb. Reg. Sess. (Cal. 1998); A.B. 600, 1999 Assemb., Reg. Sess. (Cal. 1999).

[4] The entirety of the scheme did not become law in 1998, when it was first passed by the legislature. Because the insurance disclosure regulation at issue in this case conflicted with another related bill, then-Governor Wilson vetoed the disclosure bill. Office of Ins. Advisor, Enrolled B. Rep., A.B. 1715, Reg. Sess., at 5 (Cal. 1998) ("If both bills [we]re signed, there would be two different code sections that give the Insurance Commissioner different instructions on when to revoke an insurer's certificate [of] authority."). The insurance disclosure provision (A.B. 600) passed the legislature again the following session and was signed into law by Governor Gray Davis.

The insurance regulation now before the Court serves the purpose of enabling potential claimants to obtain information needed to bring suit. The avowed aim of the provision was "to ensure that Holocaust survivors and their descendants obtain their rightful contractual compensation" from European insurance companies that had not paid claims by providing the public with the information necessary to reveal and prosecute a claim. Cal. Assemb. Ins. Comm., Assemb. Republican Bill Analysis, A.B. 1715, Reg. Sess., at 1 (Apr. 14, 1998).[5]

The entire insurance claims scheme became law on July 28, 1999, when Governor Gray Davis signed the public disclosure bill, A.B. 600. Assembly Bill 600 became the Holocaust Victim Insurance Relief Act of 1999 ("HVIRA"), Cal. Ins. Code §§ 13800 *et seq.*, the provision directly at issue here. This provision is important, but as noted, is part of a larger whole, whose true centerpiece is Cal. Civ. Proc. Code § 354.5(b) (1998), which provides that

[5] The legislation was aimed at the same European insurers who were targeted in lawsuits filed in the late 1990s, and who were also part of the United States' international commission initiative. Specifically, the companies at whom the regulation was aimed are "French, German, Italian and Swiss insurance companies" accused by California of "stalling and retaining as profits the money that should have been paid out to Holocaust victims and their heirs." Paul O'Donoghue, *Holocaust claim forms planned*, DAILY NEWS OF L.A., July 16, 1999, at 3 (A.B. 600).

> any Holocaust victim,[6] or heir or beneficiary of a Holocaust victim, who resides in this state and has a claim arising out of an insurance policy or policies purchased or in effect in Europe before 1945 from an insurer [that sold life, property, liability, health, annuities, dowry, educational, casualty, or any other insurance covering persons or property to persons in Europe at any time before 1945] may bring a legal action to recover on that claim in any superior court of the state for the county in which the plaintiff or one of the plaintiffs resides, which court shall be vested with jurisdiction over that action until its completion or resolution.

This centerpiece is effectuated by the statute of limitations provision, authorizing suits to be filed through December 31, 2010, Cal. Civ. Proc. Code § 354.5(c), and the public disclosure of information regarding unpaid insurance claims required by the HVIRA, *see* Cal. Ins. Code §§ 13800 *et seq.*

Concluding that it had not "done enough to punish [the] corporations"[7] that had aided Axis governments during World War II, the legislature quickly adopted additional legislation. The new provision of the World War II scheme created a state-law cause of action for former U.S. prisoners of war and others forced to work for private companies during World War II, despite the fact that all claims against Japan and its nationals had been explicitly settled and waived by the 1951 Treaty of Peace with Japan. Treaty of Peace with Japan, Sept. 8, 1951, art. 14(b), 3 U.S.T. 3169; *see also*

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[6] A "Holocaust victim" is defined as "any person who was persecuted during the period of 1929 to 1945, inclusive, by Nazi Germany, its allies, or sympathizers." *Id.* § 354.5(a)(1).

[7] See Cal. Sen. Tom Hayden, Floor Speech for S.B. 1245 (on file in legislative bill file of S.B. 1245).

infra pp. 16-17, note 13 (further discussion of Treaty of Peace).

The forced labor provision, Cal. Civ. Proc. Code § 354.6 (1999) ("Section 354.6") provides that

> [a]ny Second World War slave labor victim,[8] or heir of a Second World War slave labor victim, Second World War forced labor victim,[9] or heir of a Second World War forced labor victim, may bring an action to recover compensation for labor performed as a Second World War slave labor victim or Second World War forced labor victim from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate. That action may be brought in a superior court of this state, which court shall have jurisdiction over that action until its completion or resolution.

Cal. Civ. Proc. Code § 354.6(b). The statute provides that claims brought under it may be brought until 2010. *Id.* § 354.6(c).

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[8] A "Second World War slave labor victim" is defined as "any person taken from a concentration camp or ghetto or diverted from transportation to a concentration camp or from a ghetto to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers." Cal. Civ. Proc. Code § 354.6(a)(1).

[9] A "Second World War forced labor victim" is defined as "any person who was a member of the civilian population conquered by the Nazi regime, its allies or sympathizers, or prisoner-of-war of the Nazi regime, its allies or sympathizers, forced to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers." Cal. Civ. Proc. Code § 354.6(a)(2).

B. Judicial Challenges to the Scheme.

All of these similar, related provisions were challenged in state and federal court under several legal theories. Although most courts concluded that these statutes were invalid for constitutional or other reasons, they differed in their approaches, and in some cases in their conclusions.

In the cases below, the Ninth Circuit concluded that the HVIRA did not violate the foreign affairs doctrine, *see Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F.3d 739 (9th Cir. 2001), or principles of due process, *see Gerling Global Reinsurance Corp. of Am. v. Low*, 296 F.3d 832 (9th Cir. 2002). In so doing, it reversed the district court twice, which had concluded that the statute did both things. *See Gerling Global Reinsurance Corp. of Am. v. Low*, 186 F. Supp. 2d 1099 (E.D. Cal. 2001) (due process); *Gerling Global Reinsurance Corp. of Am. v. Quackenbush*, 2000 WL 777978 (E.D. Cal. June 9, 2000) (foreign affairs).

In comparison, the forced labor provision, Section 354.6, has been found more problematic than the HVIRA. For example, one district court, *Deutsch v. Turner Corp.*, 2000 WL 33957691 (C.D. Cal. Aug. 25, 2000), dismissed an action brought by a Holocaust slave labor victim on political question grounds.[10] Several decisions concluded that Section 354.6 ran afoul of the Treaty of Peace with Japan, which fully and finally resolved all wartime claims against Japan and its nationals. *See In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1153, 1157 (N.D. Cal. 2001) (Forced Labor (Filipinos)) (holding that the Treaty of Peace with Japan barred their claims for damages); *In re World War II Era Japanese Forced Labor Litig.*, 114 F.

[10] Likewise, *Alperin v. Vatican Bank*, 2003 WL 220434 (N.D. Cal. Jan. 3, 2003), and *Zivkovich v. Vatican Bank*, 2002 WL 31971730 (N.D. Cal. Aug. 23, 2002), held plaintiffs' claims, alleging injuries during World War II, were barred by the political question doctrine.

Supp. 2d 939 (N.D. Cal. 2000) (Forced Labor (Allied I)) (same); *see also Mitsubishi Materials Corp. v. Superior Court*, 2003 WL 253877 (Cal. App. 4th Feb. 6, 2003) (same). In another Northern District of California decision, the court concluded that Section 354.6 was an unconstitutional intrusion on the exclusive foreign affairs power of the United States. *In re World War II Era Japanese Forced Labor Litig.*, 114 F. Supp. 2d 1160, 1178 (N.D. Cal. 2001) (Forced Labor (Ailied II)) (discussing forced labor claims by Korean and Chinese civilians).

The Ninth Circuit affirmed all of these district court holdings on the grounds that the forced labor provision is an unconstitutional exercise of foreign affairs power. *See Deutsch v. Turner Corp.*, 317 F.3d 1005 (9th Cir. 2003). The *Deutsch* court held that Section 354.6 is an unconstitutional violation of the United States' exclusive power to make foreign policy and decide the terms on which wars and war claims are to be resolved. The court also expressed doubts as to whether the provisions setting forth a new statute of limitations – which "would actually revive claims that been previously time-barred, thus upsetting the repose of potential defendants" – comported with due process. *See id.* at 1020 n.4.

The *Deutsch* decision was announced just days after one California court of appeal rejected the views of the United States that claims under Section 354.6 could not be decided by California courts and allowed to go forward alleged forced labor suits brought by persons of Korean and Japanese origin. *See Taiheiyo Cement Corp. v. Superior Court*, 129 Cal. Rptr. 2d 451 (Cal. App. 2d 2003). In direct contradiction to the Ninth Circuit's opinion in *Deutsch*, the court of appeal rejected the defense based on the foreign relations preemption doctrine. *See* 129 Cal. Rptr. at 472. The court of appeal also rejected defendants' due process and political-question arguments. *See id.* Yet, just a few weeks later, another California court of appeal concluded that such

other California court of appeal concluded that such claims could not proceed, on the ground that claims of Allied prisoners of war are barred by the 1951 Treaty of Peace with Japan. *See Mitsubishi Materials Corp. v. Superior Court*, 2003 WL 253877 (Cal. App. 4th Feb. 6, 2003) (holding that the Treaty of Peace with Japan barred their claims for damages).

C. Other State Legislation Providing Claims for World War II Injuries.

At roughly the same time that the first provision of the California scheme was enacted, Florida's Holocaust Victims Insurance Act (FHVIA) also took effect. *See Gerling Global Reinsurance Corp. of Am. v. Gallagher*, 267 F.3d 1228, 1229 (11th Cir. 2001). Like California's HVIRA, the FHVIA required each insurer doing business in Florida to publicize information regarding policies issued by its affiliates in Europe between 1920 and 1945. *See id.* at 1229-30. The public disclosure requirement of the Florida statute, along with a provision "creat[ing] a new ten-year statute of limitations for the presentation of [such] claims," facilitated the bringing of a private cause of action by individuals seeking damages for the non-payment of a Holocaust-era policy. *Id.* at 1230. "Accordingly, a Florida insurer could be liable . . . based upon the non-payment of a Holocaust-era policy by a separate foreign company that it does not control, but with which it happens to be affiliated." *Id.* at 1230-31.

Although Florida's scheme was invalidated on due process grounds by the Eleventh Circuit, *Gallagher*, 267 F.3d at 1229, several other States also have enacted statutes containing provisions similar to the HVIRA and the FHVIA. *See, e.g.*, Ariz. Rev. Stat. §§ 20-490 *et seq.* (2002); Md. Code Ann., Ins. §§ 28-101 *et seq.* (1999); Minn. Stat. § 60A.053 (2000); N.Y. Ins. Law §§ 2701 *et seq.* (1998); Tex. Ins. Code Ann. § 21.74 (2001); Wash. Rev. Code §§ 48.104.010 *et seq.* (1999). The Arizona statute was enacted soon after the

Ninth Circuit's decision below, upholding the HVIRA against constitutional challenge. Thus, if this Court were to affirm the Ninth Circuit, European insurers and their affiliates may be forced to determine whether to continue doing business in at least eight States – and possibly many more.

II. CALIFORNIA'S STATUTORY SCHEME IS AN UNCONSTITUTIONAL INTRUSION INTO FOREIGN AFFAIRS.

A. California's Statutory Scheme Is Unconstitutional Under the Foreign Affairs Doctrine Articulated by This Court.

It has been well settled since this nation's founding that the resolution of war claims is exclusively the responsibility of the *federal* government to address, through treaties, state-to-state agreements, or otherwise. *See Ware v. Hylton*, 3 U.S. (Dall.) 199, 230 (1796). "Power over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink*, 315 U.S. 203, 233 (1942). States have neither the power nor the right to interfere with the federal priority in this area. *See Stewart v. Kahn*, 78 U.S. 493, 506-07 (1871) (States cannot interfere with federal war- and peace-making powers, which include the power to "remedy the evils which have arisen from [a war's] rise and progress").

Indeed, "*all* [foreign policy] responsibility is reposed at the national level rather than dispersed among the states and localities." 1 Laurence H. Tribe, *American Constitutional Law* §§ 4-5 (3d ed. 2000). The exclusivity of federal power over foreign affairs is crucial to our system of government: "The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it." *The Federalist No. 80* (Alexander Hamilton). It is clear that matters concerning war are part of the

"inner core" of the foreign relations power that is denied to the States. *Deutsch*, 317 F.3d at 1022.[11]

This Court has long held that the foreign affairs powers specified in the Constitution reflect the general principle that power over foreign affairs is reserved to the federal government. *See, e.g., Pink*, 315 U.S. at 233; *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889) (*The Chinese Exclusion Case*). The Court most recently confirmed this bedrock principle in *Zschernig v. Miller*, holding that state law "must give way" if it "impair[s] the effective exercise of the Nation's foreign policy." 389 U.S. 429, 440 (1968); *see also Kolovrat v. Oregon*, 366 U.S. 187, 198 (1961); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941). Accordingly, in *Zschernig*, this Court invalidated an Oregon statute preventing nonresident aliens from inheriting property unless they could prove that U.S. citizens had a reciprocal right to inherit property in their home country. 389 U.S. at 430-31 & n.1.

Specifically, the Court noted that application of the Oregon statute and similar state laws had "led [to] minute inquiries [by the States] concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements," and other foreign affairs matters. *Id.* at 435. Noting that "foreign affairs and international relations [are] matters

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[11] As the *Deutsch* court noted:

> Of the eleven clauses of the Constitution granting foreign affairs powers to the President and Congress . . ., seven concern preparing for war, declaring war, waging war, or settling war. Most of the Constitution's express limitations on state's foreign affairs powers also concern war. Even those foreign affairs powers in the Constitution that do not expressly concern war and its resolution may be understood, in part, as a design to *prevent* war. Indeed, as the *Federalist* shows, supporters of the new Constitution believed that disunity in international affairs risked unnecessary war. *See, e.g., The Federalist No. 3*, at 13 (Clinton Rossiter ed. 1961).

317 F.2d at 1022-23.

which the Constitution entrusts solely to the Federal Government," *id.* at 436, the Court found it "inescapable" that the law, as applied, "affects international relations in a persistent and subtle way," *id.* at 440, has "more than 'some incidental or indirect effect on foreign countries,'" and creates "great potential for disruption or embarrassment," *id.* at 434-35 (citation omitted), and was therefore an unconstitutional exercise of the exclusively federal foreign affairs powers.

Permitting California to enforce its legislative scheme against European and Japanese corporations for conduct committed in countries under the rule of "the Nazi regime" during World War II would have precisely such undesirable effects. The California statutory scheme is a regulation of foreign affairs by a State in both purpose and effect. As both its language and legislative history make clear, California's World War II claims legislation represents an attempt by California to forge its own settlement of World War II-era claims in a manner that is contrary to the federal government's exclusive power to conduct foreign relations. Indeed, the principal sponsor of Section 354.6 stated that he introduced the legislation to force the United States to deal with Holocaust claims in a manner pleasing to *California's* foreign policy view.[12] *See infra* note 16.

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[12] California has repeatedly ignored the United States' views. Even after the legislature decided to proceed with enactment of the World War II scheme in the face of expressed concerns from the federal government, the United States told California courts of such concerns and of the conflict between the California statute and United States aims and views, including those underlying its post-war treaties and 50 years of subsequent foreign policy. At least three state courts have felt free to ignore those views. *See Taiheiyo Cement Corp. v. Superior Ct.*, 129 Cal. Rptr. 2d 451 (Cal. App. 2d 2003), *affirming Jeong v. Onoda Cement Co.*, No. BC 217805, slip op. at 11 (Cal. Super. Ct. Nov. 29, 2001) (disparaging U.S. statement of interest and holding that U.S. foreign policy, "if it is a policy, appears to be legally unsupportable"); *In re Japanese P.O.W. Cases*, Jud. Coun. Coord. Proc. No. 4153, slip op. at 2 (Cal. Super. Ct.

For over 50 years, the federal government has utilized diplomatic means to negotiate the resolution of World War II-era claims on behalf of the United States.[13] California enacted its own statutory scheme knowing full well that the threat of tort liability could directly influence federal foreign policy. *See* Weinstein, *Hope Raised*, *supra*, at A3 (A.B. 600).

Indeed, various provisions of that scheme have an impact on U.S. foreign relations that is much more than "incidental or indirect." For example, the Treaty of Peace with Japan – which the United States was largely responsible for drafting and negotiating and which was designed to effectuate U.S. foreign policy for Asia that endures to the present day, *see, e.g.*, Br. of United States at 16-17, *Suk Yoon Kim v. Ishkawajima Harima Heavy Indus. Co., Ltd.*, Nos. 01-17197 *et al.* (9th Cir. filed June 6, 2002) – explicitly settles and waives all claims of the Allied governments and their nationals against Japan and its nationals, provides a mechanism for

Oct. 19, 2001) (rejecting State Department's views on Peace Treaty with Japan), *rev'd*, *Mitsubishi Materials Corp. v. Superior Ct.*, 2003 WL 253877 (Cal. App. 4th Feb. 6, 2003). In so doing, those courts have ignored this Court's decisions requiring deference to the United States' views. *See, e.g.*, *Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176, 184-85 (1982); *see also In re Aircrash in Bali*, 684 F.2d 1301, 1309 (9th Cir. 1982) (courts must "studiously avoid imposing [their] own view[s] of foreign policy objectives and must accept the foreign policy formulations of the executive").

[13] The most striking and successful effort is reflected in the Treaty of Peace – negotiated by the United States among its allies and Japan – which fully and finally settled all war-related claims between the United States, the other Allies, and Japan, as well as all their nationals. Although the Cold War prevented a final peace treaty with Germany, the United States policy for nearly 50 years was effected in a series of treaties and international agreements dealing with World War II claims against Germany and its nationals. *See Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 447-56 (D.N.J. 1999); *Burger-Fischer v. Degussa*, 65 F. Supp. 2d 248, 255-60 (D.N.J. 1999).

compensating POWs, and dictates that claims of Korea and China and their nationals are to be settled through government-to-government arrangements, not lawsuits in U.S. courts. *See* Treaty of Peace with Japan, Sept. 8, 1951, art. 4(c), 14(b), 3 U.S.T. 3169. California has attempted to subvert this international agreement through the forced labor provision, which purports to provide a cause of action for former U.S. military personnel and others held captive and forced to labor in Axis-occupied territory during World War II. Cal. Civ. Proc. Code § 354.6.

The United States has taken the position that such lawsuits threaten to have a "serious negative impact on U.S.-Japan relations," Statement of Interest of United States at 34, *In re World War II Era Japanese Forced Labor Cases* (Allied II), MDL No. 1347 VRW (N.D. Cal. filed Dec. 6, 2000), and Japan has observed that these lawsuits are "detrimental to bilateral relations between our two countries." *The Views of the Government of Japan on the Laws Against Japanese Companies by Former American Prisoners of War and Others* at 2 (*Note Verbale* from Embassy of Japan to U.S. Dept. of State, Aug. 8, 2000) [hereinafter *Note Verbale*] (cited by. Thus, there can be no doubt that Section 354.6 undermines the credibility of the United States as a treaty partner, threatening "great . . . disruption or embarrassment" for the national government. *Zschernig*, 389 U.S. at 434-35. It is difficult to imagine how state legislation could intrude more directly on the federal government's foreign affairs power than by creating a cause of action permitting claims previously settled by treaty, implicitly overturning the very terms on which the war was concluded.

In addition, California's World War II legislation affects U.S. foreign relations by singling out for differential treatment not just Japan, but also Germany and other European nations. The California scheme targets these countries because it focuses only on conduct involving Axis govern-

ments during World War II, but ignores insurance fraud and forced labor practices perpetrated by other countries or during other eras. The United States, Germany, Switzerland, and Japan have all agreed that the scheme at issue threatens to damage relations between the United States and each of these countries. *See* Br. of United States in Support of Pet. at 17-18; *Note Verbale*, *supra*, at 2. Singling out disfavored foreign regimes is just the kind of interference with U.S. foreign policy that *Zschernig* condemned.[14]

This statutory scheme is a pronouncement of the foreign policy of the State of California.[15] That, in and of itself, is beyond any State's constitutional jurisdiction. It is all the more so where the State's foreign policy contradicts the longstanding foreign policy of the United States – here, the position that resolution of World War II-era claims is to be handled through negotiations, rather than private lawsuits in state or federal courts. *See, e.g.*, Br. of United States in Support of Pet. at 16; Br. of Gov't of Switzerland in Support of Pet. at 6-7; Br. of Federal Rep. Of Germany in Support of

[14] Such discrimination is also a hallmark of unconstitutional retroactive legislation, yet another reason – apart from those articulated *infra* Section II – that the California scheme violates due process. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) ("[P]olitical pressures pose[] a risk that . . . retroactive legislation [may be used] as a means of retribution against unpopular groups."). By subjecting European and Japanese companies to potentially massive new liability for war-related conduct more than 50 years after the fact, the scheme "attaches a new legal consequence to events completed before its enactment." *Id.* at 270. Moreover, the new legal consequence is "substantial and potentially far-reaching." *Eastern Enters. v. Apfel*, 524 U.S. 498, 534 (1998).

[15] Indeed, a California judge actually chastised the United States for interfering with *California*'s foreign policy by challenging Cal. Civ. Proc. Code § 354.6: "Why is the United States now trying to put pressure on the state of California? . . . *Why are you interfering with our foreign policy?*" *Jeong v. Onoda Cement Co.*, No. BC 217805, Tr. at 21 (Cal. Super. Ct. Nov. 7, 2001) (emphasis added).

Pet. at 7. "[T]he use of subnational government authority to pursue agendas that directly contradict U.S. foreign policy is far too dangerous and simply cannot be condoned." Earl H. Fry, *The Expanding Role of State and Local Governments in U.S. Foreign Affairs* 132 (1998). This threat has rarely been more apparent than it is in the context of this and similar statutory schemes.

B. The Continuing Importance of the Foreign Affairs Doctrine.

States and localities have become "bolder than ever" when it comes to injecting themselves into issues of foreign policy. Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1130 (2000). During the past decade, they have enacted numerous statutes relating to U.S. foreign policy.[16] This trend only underscores the need for a continued – even

[16] For example, apart from the regulation and related legislation involved in this case and the numerous similar statutes enacted in a variety of states, *see supra* p. 12, the California legislature enacted a statute authorizing California state courts to hear suits seeking premiums on Armenian genocide-era insurance policies, despite forum-selection clauses in the policies, and extending the applicable statute of limitations through 2010. *See* Cal. Civ. Proc. Code § 354.4 (2000). Other high-profile state involvement in foreign affairs includes, for example, the recent enactment by Massachusetts, along with other states and localities, of "Burma laws," which restricted the ability of the state and its agencies to purchase from companies doing business with Burma (Myanmar). *See Crosby v. National Foreign Trade Council*, 530 U.S. 363, 366-67, 371 n.5 (2000).

Localities too have become embroiled in foreign affairs. For example, in response to the allegations of Holocaust-era asset laundering, "New York City's comptroller . . . banned certain Swiss banks from bidding on billions of dollars in bond offerings and other contracts sponsored by their respective agencies," despite the fact that "[t]hese bans have been severely criticized by the U.S. Department of State." Earl H. Fry, *The Expanding Role of State and Local Governments in U.S. Foreign Affairs* 5 (1998).

revitalized – doctrine circumscribing the tendency of States and localities to assert authority where they have none. "[T]he need for clear boundaries in which a state may permissibly regulate and legislate becomes essential." Todd Jascott, *Reemergence of the Zschernig Doctrines and the Foreign Affairs Powers as a Limit on a State's Power to Act*, 10 TULANE J. INT'L & COMP. L. 423, 444 (2002).

Except for the decision below, federal courts have uniformly agreed that state World War II claims recovery statutes are unconstitutional. But there has been disagreement as to why. A clear statement by this Court of how the *Zschernig* doctrine applies to such statutes would be of immeasurable assistance to the lower courts, counsel, and companies involved in World War II claims litigation throughout the federal and state judicial systems. Such clarity would also be of service to plaintiffs pursuing claims under such statutes. As one court has noted, "[i]t would be a disservice to [the] heroes of World War II to create the false hope of some sort of monetary recovery" based on state statutes that are constitutionally infirm. *Mitsubishi Materials Corp.*, 2003 WL 253877, at *1.

III. THE CALIFORNIA SCHEME IS AN EXERCISE OF EXTRATERRITORIAL JURISDICTION THAT VIOLATES PRINCIPLES OF DUE PROCESS.

It is axiomatic that States may not regulate conduct occurring entirely outside of their borders. Thus, where "a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310-11 (1981) (plurality); *id.* at 333 (Powell, J., dissenting); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985) (State "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them") (quoting *Home Ins. Co. v. Dick*, 281 U.S. 397,

410 (1930)); *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66, 70 (1954) ("[A] state is without power to . . . regulate and control activities wholly beyond its boundaries."). Consistent with this principle, the Court in *Shutts* held that Kansas could not constitutionally apply its laws to claims arising from transactions conducted between parties who were not Kansas residents, and who had no connection to the State. 472 U.S. at 821-22. Instead, the Court held that "Kansas must have a 'significant contact or aggregation of contacts' to the claims . . ., contacts 'creating state interests,' in order to ensure that the choice of Kansas law is not arbitrary or unfair." 472 U.S. 797, 821 (1985) (quoting *Hague*, 449 U.S. at 312-13). A touchstone of this fairness inquiry is "the expectation of the parties." *Id.* at 822.

The Court has made clear that in order to constitutionally regulate conduct, a State must have sufficient contacts both with the parties and with the underlying subject matter being regulated. *See Hague*, 449 U.S. at 310-11 (State cannot constitutionally apply its law if it "has only an insignificant contact with the parties *and the occurrence or transaction*") (emphasis added); *accord Gallagher*, 267 F.3d at 1238 ("[W]e must look not only at whether the parties regulated by the Act have contacts with Florida, but also and more importantly here at whether the subject about which this Act seeks information has a sufficient nexus to Florida.").

Through its World War II compensation scheme – which purports to create new causes of action for claims arising out of World War II, extend the statute of limitations on such claims, and facilitate the bringing of certain of these claims through the required public disclosure by foreign companies of certain types of information – California has attempted to regulate a subject matter with which it has no relationship – namely, conduct by citizens of European and Asian countries that occurred solely in Europe and Asia before and during World War II. This conduct and these actions had no con-

nection to California at the time, and at no time prior to the enactment of California's World War II reparations scheme could any of the foreign companies have foreseen that California law might govern their conduct.

The Ninth Circuit (Pet. App. 20a) held that California has an interest sufficient to support the HVIRA provision because, that court believed, that provision is merely a disclosure requirement, directly applicable only to California insurers. This is quite wrong. The overriding purpose of the HVIRA – and the World War II scheme generally – is to identify and facilitate (*i.e.*, to regulate) the payment of claims arising out of World War II-era conduct in foreign countries.[17] The specific statutory provision at issue cannot be

[17] In the courts below, the Commissioner attempted to defend the HVIRA by asserting that California had "other legitimate purposes for the statute, such as informing California residents about potentially valid claims and about the character of the family of companies with whom they might contract for insurance." Pet. App. 16a. These eleventh-hour justifications find no support in the statutory language or the legislative history and do nothing to undermine the conclusion that California is attempting to regulate extraterritorial conduct.

As the Court recently reaffirmed, "[w]e ascertain the purpose of a statute by drawing logical conclusions from its text, structure, and operation." *Nguyen v. INS*, 533 U.S. 53, 67-68 (2001). Accordingly, subsequent restatements of the statutes' purposes by the Commissioner cannot overcome the explicit language of the legislation itself. *Id.* ("Statements from the government's brief are not conclusive as to the objects of the statute, however, as we are concerned with the objectives of Congress, not those of the INS."); *see also Gallagher*, 267 F.3d at 1239-40 (rejecting similar attempt by Florida Commissioner because that position "[could not] be squared with the Legislature's own unequivocal statement of its purpose").

Here, the text, structure, and operation of the scheme make plain that its sole purpose is to identify and facilitate payment of World War II-era claims. The HVIRA provides that "the department has an affirmative duty to play an independent role in representing the interests of Holocaust survivors" (Pet. App. 115a), and insurance companies have a responsibility to "ensure the rapid resolution of these [unpaid policy

assessed in a vacuum, divorced from its context. Rather, it must be viewed as part and parcel of a comprehensive legislative scheme. *See De Veau v. Braisted*, 363 U.S. 144, 147 (1960) ("Due consideration of the constitutional claims that are made requires that [this section] be placed in the context of the structure and history of the legislation of which it is a part."); *see also New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 115 (1978) (Stevens, J., dissenting) ("[I]t is necessary to review the statutory scheme as a whole, to identify the purpose of the specific provision challenged in this case, and to explain the actual operation of that provision.").

Plainly, California's statutory scheme is intended to secure compensation for victims of conduct by foreign governments and nationals that took place in foreign countries more than half a century ago during a world war. California plainly has no serious interest *specific to California* in regulating such conduct. The only parties and conduct currently involved are the foreign companies who assertedly refuse claims made by persons seeking compensation for alleged injuries that occurred in Europe or Asia during World War II. Yet, California had no contact with that conduct during the war, and thus has no constitutionally valid interest in promulgating the regulation.

Even with respect to the HVIRA provision itself, there can be no legitimate dispute that the essential *effect* of the HVIRA is to regulate *European* insurance companies, by

claims], eliminating the further victimization of these policyholders and their families (Cal. Ins. Code § 13801(e); Pet. App. 119a). In addition, the legislature found that the HVIRA is "necessary to protect the claims and interests of California residents, as well as to encourage the development of a resolution to these issues through the international process or through direct action by the State of California, as necessary." *Id.* § 13801(f); Pet. App. 119a. This background reveals that purpose of HVIRA was to identify and facilitate the payment of World War II-era claims in California and nothing more.

forcing them to disclose information that will facilitate the bringing of insurance claims on unpaid World War II-era policies.[18] The Eleventh Circuit correctly recognized that fact in determining that the Florida counterpart of the HVIRA infringed due process rights. *Gallagher*, 267 F.3d at 1238 (referring to Florida insurers as "the (nominally) regulated parties"). Without question, California's scheme imposes de facto regulation on foreign companies that have no connection to the State. Thus, the "practical effect" of the legislation is to compel "conduct beyond the boundaries of the State." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989).

That extraterritorial regulatory effect is also plainly the law's central *purpose*. In enacting the HVIRA, California principally sought to force payment on the underlying claims of World War II-era victims against European insurance companies, not to affect the insurance behavior of California insurance companies. *See* Pet. App. 115a (statute seeks "to ensure the rapid resolution of these [claims]"). The *Gallagher* court explicitly recognized that reality, noting that "[t]he reporting provisions pertain to, and as a practical matter unquestionably seek to regulate, a subject matter – the European affiliates' payment or non-payment of Holocaust-era policy claims – with no jurisdictionally significant relationship to Florida." 267 F.3d at 1238.[19] In short, when viewed in its full context – as it must be – neither the parties[20] nor the conduct that is the true subject of regulation

[18] Likewise, the targets of the forced labor provisions are World War II-era European and Asian companies and their successors. Cal. Civ. Proc. Code § 354.6(b).

[19] The forced labor provisions similarly seek to facilitate compensation for conduct that took place entirely in Europe and Asia.

[20] The fact that some plaintiffs have since moved to California does not provide sufficient contacts to warrant extension of California law to claims arising at least 55 years earlier in foreign countries. *See, e.g.*, *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178 (1936); *Home Ins. v. Dick*, 281 U.S. 397, 408 (1930); *McCluney v. Jos. Schlitz Brewing Co.*, 649 F.2d 578, 583-84 (8th Cir. 1981); *see also Shutts*, 472 U.S. at 821 ("[W]hile a State may . . . assume jurisdiction over the claims of [parties] whose principal contacts are with other States, it may not use this assumption of jurisdiction as an added weight in the scale when considering the permissible constitutional limits on choice of substantive law."); *Hague*, 449 U.S. at 319 (plurality) (a subsequent change of residence to the forum State "insufficient in and of itself to confer power on the forum State to choose its law").

have a sufficient nexus with California to permit the sort of extraterritorial regulation at issue here.

Moreover, even if the Court, viewing the HVIRA in isolation, views it as "only" a disclosure regulation, that hardly means that it does not regulate foreign companies. *See Dole v. United Steelworkers of Am.*, 494 U.S. 26, 28 (1990) (disclosure requirements are among available "regulatory tools"); *see also United States v. O'Hagan*, 521 U.S. 642, 668 (1997) (Congress may design a statute "to make 'disclosure … the preferred method of market regulation.'") (quoting *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1 (1985)); *BMW v. Gore*, 517 U.S. 559, 570-71 (1996). The Ninth Circuit itself recognized that "[s]eeking information from insurers about their claims-paying record, to be used in the licensing process, is a form of regulating the business of insurance." Pet. App. 45a n.3. No matter how it is viewed, the California scheme attempts to export state law to govern claims and parties that bear no relation whatever to California, thus violating principles of due process.

IV. EVEN IF IT AFFIRMS THE JUDGMENT BELOW, THE COURT SHOULD BE CAREFUL NOT TO ENDORSE THE ENTIRE WORLD WAR II SCHEME AND SCHEMES LIKE IT.

The foregoing constitutional arguments apply as well to the remaining provisions of the California scheme creating causes of action for insurance and forced labor claims. Re-

gardless of how it rules in this case, the Court must be aware of the interconnections and distinctions among all of these provisions, and make its judgment about the HVIRA with appropriate care for the effects of that judgment on these other provisions.

As an initial matter, if the HVIRA is an unconstitutional exercise of foreign affairs power or a violation of due process, then the private causes of action provisions are invalid *a fortiori*. But even if the Court concludes that the HVIRA itself does not violate the foreign affairs doctrine or principles of due process, the private cause of action provisions of the California scheme would still be unconstitutional under each of those theories. Even the Ninth Circuit recognized that the forced and slave labor provision, Section 354.6, is a more extreme exercise of state power than the HVIRA and that Section 354.6 is unconstitutional even if the HVIRA is not. *See Deutsch*, 317 F.3d at 1019-20. As the Ninth Circuit recognized in holding Section 354.6 unconstitutional, if the HVIRA is construed to have the scope and effect attributed to it by the Ninth Circuit in the case now before the Court, the differences between such cause-of-action provisions and the HVIRA are constitutionally significant. *See Deutsch*, 317 F.3d at 1020 n.4.

The forced and slave labor provision (Section 354.6), like the cause of action provision of the insurance scheme (Cal. Civ. Proc. Code § 354.5), is unconstitutional even if the HVIRA is not. No plausible argument can be made that creating judicial remedies for World War II conduct by persons having no connection with California, and which arose out of the State (indeed out of the country), are "traditional state regulation" with only an "incidental or indirect" impact on

foreign policy. Thus, such policies are an unconstitutional exercise of state power.[21]

Obviously, the Court need not concern itself with the substantive merit of challenges to the cause of actions provisions of the California statutory scheme, which are not before it at this time. But because its decision in this case will certainly be looked to by courts and parties in litigation involving such statutes, it is essential for the Court to be aware of those provisions when addressing the issues raised by the HVIRA.

CONCLUSION

The judgment below should be reversed.

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[21] While *Deutsch* did not explicitly reach the due process question, the cause of action provisions also violate due process. Indeed, because the cause of action provisions are directly applicable only against foreign companies (or their recently formed U.S. subsidiaries), they regulate out-of-state conduct even more exclusively and directly than HVIRA, which achieves the same result through direct regulation of affiliated companies that do business in California.

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IN THE

Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, AMERICAN RE-INSURANCE COMPANY, *et al.*,

Petitioners,

v.

JOHN GARAMENDI, COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE FEDERAL REPUBLIC OF GERMANY AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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for the Ninth Circuit**

BRIEF FOR THE FEDERAL REPUBLIC OF GERMANY AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The Federal Republic of Germany respectfully submits this brief as amicus curiae in support of petitioners and urges the Court to reverse the decisions of the United States Court of Appeals for the Ninth Circuit in *Gerling Global Reinsurance Corp. of America v. Low*, 240 F.3d 739 (2001), and *Gerling Global Reinsurance Corp. of America v. Low*, 296 F.3d 832 (2002).[1]

[1] Petitioners and respondent have consented to the filing of this brief; their letters of consent are on file with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Federal Republic of Germany, made a monetary contribution to the preparation or submission of this brief.

INTEREST OF AMICUS CURIAE

The Federal Republic of Germany has a very strong interest in this case, as reflected by its prior participation as an amicus curiae, because the California regulatory statute at issue, the Holocaust Victim Insurance Relief Act of 1999 ("HVIRA"),[2] has a manifestly adverse impact on the Federal Republic's sovereign interests and on its foreign relations with the United States of America. In addition, the HVIRA, if enforced, would require German companies who themselves do no business in California to violate German privacy laws.

INTRODUCTION AND SUMMARY OF ARGUMENT

The State of California's HVIRA affronts the sovereignty of the Federal Republic. The Federal Republic's sovereign interests are neither marginal nor academic—the question of restitution and compensation for victims of the National Socialist era and World War II is of the utmost importance to Germany, as a matter of both domestic and foreign policy.

Over the last 55 years, Germany has structured and provided over $100 billion in today's value in restitution and compensation to victims of National Socialism. These efforts culminated in the year 2000, when the Federal Republic of Germany, the United States of America, and others entered into two historic agreements—together, known as the "Berlin Agreements"[3]—for the purpose of

[2] Cal. Ins. Code §§ 13800-13807 (SER 516-524). "ER" refers to the Excerpts of Record in the preliminary injunction appeal, and "SER" refers to the Supplemental Excerpts of Record in the permanent injunction appeal.

[3] Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America concerning the Foundation, "Remembrance, Responsibility and the Future," July 17, 2000 ("Executive Agreement") (ER 818-37); Joint Statement on Occasion of the Final Plenary Meeting Concluding International Talks on the Preparation of the Foundation, "Remembrance, Responsibility and the Future," July 17, 2000 ("Joint Statement") (ER 812-16).

providing additional compensation to certain surviving Holocaust victims and their heirs, and achieving legal closure for German companies. Under these agreements, the Federal Republic and thousands of German companies committed to endow a new German foundation with DM 10 billion (approximately $5 billion) to provide payments to more than 1.5 million aging victims of slave and forced labor and other Nazi-era wrongs, including those who hold any insurance policies that remain unpaid notwithstanding the extensive preceding post-war restitution and compensation programs. By international accord, the foundation is to be the exclusive remedy and forum for all asserted claims, including insurance-related claims.[4]

The HVIRA directly interferes with international agreements and German domestic legislation that together form the legal basis of Germany's post-war restitution and compensation programs. Not content with U.S. foreign policy, international agreements, and processes established by sovereign nations, the State of California enacted the HVIRA and several related statutes in 1999, as part of its own "foreign policy" for the resolution of Holocaust-era claims. California's statutory scheme—which is inconsistent with German and U.S. foreign policy—has the practical effect of regulating the insurance industry in Germany (and elsewhere in Europe) and empowering California courts to serve as a forum for contentious litigation against German and other foreign companies. The HVIRA in particular threatens to revoke the license of any California insurance companies whose German (or other European) affiliates fail to disclose in a public registry the personal data from every insurance policy issued in Europe between 1920 and 1945. By leveraging asserted regulatory power over local insurers through the HVIRA, the State of California seeks to compel

[4] *See* Executive Agreement, art. 1(1), 1(4) (ER 821-22).

German companies to engage in conduct that would violate German and European laws.

The HVIRA impinges on Germany's sovereign authority to regulate its own insurance industry and to create exclusive post-war restitution and compensation programs in cooperation with other nations. Moreover, it frustrates the spirit and purpose of the U.S.-German Executive Agreement and creates tension in diplomatic relations between the United States and Germany.

The Ninth Circuit's decisions upholding the HVIRA conflict with decisions of other Circuits[5] and violate well-established legal principles: (a) by holding, in the first decision, that the HVIRA did not violate limits imposed on state power by the reservation to the federal government of the Foreign Affairs power and by the dormant Foreign Commerce Clause of the U.S. Constitution; and (b) by holding, in the second decision, that the HVIRA did not exceed limits imposed on state power by the Due Process Clause of the U.S. Constitution to legislate with respect to matters outside its boundaries. Reversal of these decisions is necessary to enjoin the State of California's intrusion on German sovereignty and its impermissible interference with the U.S.-German Executive Agreement and the Federal Republic's ability to engage in diplomatic relations with the United States as a unitary political entity.

BACKGROUND

I. GERMANY'S POST-WAR COMPENSATION AND RESTITUTION PROGRAMS

For over fifty years, Germany has acknowledged its moral and historical responsibility to compensate the victims of National Socialist persecution and oppression. In 1951, two years after the founding of the Federal Republic in 1949,

[5] *See, e.g., Gerling Global Reinsurance Corp. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001).

Chancellor Konrad Adenauer expressed this sense of duty when he stated that "[i]n our name unspeakable crimes have been committed and they demand restitution, both moral and material . . . ."[6] Since that time, the Federal Republic has sought to address these heinous wrongs, with full awareness that no amount of money will ever be enough to atone for them. To date, the Federal Republic has paid roughly $100 billion in compensation and continues to pay approximately $600 million each year to roughly 100,000 pensioners who suffered such injuries.[7] As part of these programs, Germany returned all real estate and other assets capable of being restored to their rightful owners; paid over two million claims for assets that could not be returned, including virtually all insurance policies; and reached global settlements with Jewish survivor organizations with respect to those victims who died without heirs or did not file restitution claims.

The United Nations has commented that the Federal Republic's restitution and compensation programs are "[t]he most comprehensive and systematic precedent of reparation by a Government to groups of victims for the redress of wrongs suffered . . . ."[8]

II. THE CALIFORNIA HVIRA

The HVIRA compels each insurer "currently doing business in" the State of California to disclose detailed information concerning any insurance policies that it sold "directly or through a related company, to persons in Europe,

[6] *See* FRG Background Papers: German Compensation for National Socialist Crimes, *available at* http://www.germany-info.org/relaunch/info/archives/background/ns_crimes.html at 2 (last visited Feb. 3, 2003).

[7] *Id.* at 1.

[8] *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th Sess., Provisional Agenda Item 4, at 55, ¶ 107, U.N. Doc. E/CN.4/Sub. 2/1993/8.

which were in effect between 1920 and 1945, whether the sale occurred before or after the insurer and the related company became related . . . ." Cal. Ins. Code § 13804(a). The information that must be disclosed includes the number of insurance policies, "[t]he holder, beneficiary, and current status of those policies," and "[t]he city of origin, domicile, or address for each policyholder listed in the policies." *Id.* § 13804(a)(1)-(3). The HVIRA also requires each of these insurance companies to certify whether and how the proceeds of the policies have been paid to beneficiaries and their heirs, distributed to qualified charities, or otherwise distributed in accordance with a court order. *Id.* § 13804(b)(1)-(4).

The HVIRA in turn requires the California Commissioner of Insurance to make this information publicly available by establishing and maintaining a public Holocaust Era Insurance Registry "containing records and information relating to insurance policies . . . of Holocaust victims, living and deceased." *Id.* § 13803.

The HVIRA is part of a statutory framework that purports to empower the State of California's regulators and courts to govern the process of resolving Holocaust-related claims against European insurers. A related statute authorizes the California Commissioner of Insurance to suspend the license of an insurer for failing to pay Holocaust-related claims, regardless of the victim's connection to California, and sets forth California's own statutory definitions of Holocaust victims and claims. Cal. Ins. Code § 790.15(a) and (b)(1). Another related statute establishes a cause of action for "any Holocaust victim, or heir or beneficiary of a Holocaust victim, who resides in this state and has a claim arising out of an insurance policy or policies purchased or in effect in Europe before 1945." Cal. Civ. P. Code § 354.5(b). The statute grants California state courts venue and jurisdiction to try cases under California law, and abolishes applicable statute-of-limitations defenses if a claim is brought before December 31, 2010. *Id.* § 354.5(b) & (c).

The California Legislature's express purpose for enacting the HVIRA was to resolve questions concerning insurance policies held by Holocaust victims and survivors and to "protect the claims and interests of California residents, as well as to encourage the development of a resolution to these issues through the international process or through direct action by the State of California . . . ." Cal. Ins. Code § 13801(d)-(f).

III. GERMAN-U.S. EXECUTIVE AGREEMENT ON THE FOUNDATION

At the same time the California Legislature was seeking to impose its own views of how best to resolve these issues by enacting the HVIRA and related statutes, the Federal Republic and the United States, along with numerous other parties, were deeply engaged in diplomatic negotiations on an international agreement intended to provide a global resolution of any remaining Nazi-era claims, including unpaid insurance policies. The international efforts met with success in the form of a landmark agreement between the Federal Republic and the United States.

On July 17, 2000, the Federal Republic and the United States entered into the U.S.-German Executive Agreement. This agreement resulted from nearly two years of negotiations under the leadership of Chancellor Schröder and President Clinton. The agreement recalls "that for the last 55 years the parties have sought to work to address the consequences of the National Socialist era and World War II though political and governmental acts between the United States and the Federal Republic of Germany" and notes "that this Agreement and the establishment of the Foundation represent a fulfillment of these efforts." Executive Agreement, preamble (ER 821).

The Executive Agreement called for the Federal Republic to establish a German Foundation, "Remembrance, Responsibility and the Future" ("Foundation"), pursuant to German law, to be endowed with DM 5 billion from the

Federal Republic and another DM 5 billion from German companies, for the purpose of providing a concluding measure of relief to Nazi-era victims, including pertinently those who had uncompensated insurance claims. *See* Executive Agreement (ER 818-37).

The two countries made clear in their agreement that it is in their foreign policy interests for the Foundation "to be the exclusive remedy and forum for the resolution of all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II." *Id.*, art. 1(1) (ER 821). Relatedly, the agreement recognizes that "both parties desire all-embracing and enduring legal peace" for German companies with respect to the Nazi era "to advance their foreign policy interests." *Id.*, preamble (ER 820). To that end, the agreement obligates the United States to take steps in courts and with state and local governments in the United States to foster all-embracing and enduring legal peace for German companies. *Id.*, arts. 2(1) and 2(2) (ER 822-23; 832-35).[9]

Specifically with respect to insurance claims, Article 1(4) of the agreement provides that any remaining unpaid insurance policies that come within the claims handling procedures adopted by the International Commission on Holocaust Era Insurance Claims (ICHEIC) as of July 2000 will be processed by German companies "on the basis of such procedures and on the basis of additional claims

[9] The bilateral U.S.-German Executive Agreement was accompanied by a Joint Statement signed by the Federal Republic, the United States, Israel, five Central and Eastern European nations, the Conference on Jewish Material Claims against Germany, and other interested parties. The Joint Statement reflects an international consensus that it is in all the parties' interests for the Foundation to be the exclusive remedy and forum for the resolution of all National Socialist era and World War II claims against German companies, including insurance claims, and that German companies should receive all-embracing and enduring legal peace. *See* Joint Statement, preamble, ¶¶ 4(b) & (c) (ER 812-16).

handling procedures that may be agreed among the Foundation, ICHEIC, and the German Insurance Association." *Id.*, art. 1(4) (ER 822).

On October 16, 2002, the Foundation, ICHEIC, and the German Insurance Association (GDV) signed an agreement regarding such claims handling procedures and the publication of pertinent insurance records, in a manner that satisfies the requirements of European data protection laws. *See* Agreement Concerning Holocaust Era Insurance Claims (Lodg. L70-L89). State Department spokesman Richard Boucher explained:

> The United States continues to support the work of the Foundation, including through the fulfillment of its obligations under the July 2000 U.S.-German Executive Agreement. This insurance agreement is the result of ongoing international efforts to address the injustices of World War II and the National Socialist era. The United States continues to support efforts to resolve matters of Holocaust restitution and compensation through cooperative means outside of litigation.[10]

An advisory group and expert group established pursuant to the October 16, 2002 agreement have nearly completed preparation of a list of holders of insurance policies issued by German companies who may have been Holocaust victims. The list is expected to be published by ICHEIC in April 2003.

IV. GERMANY'S FOUNDATION LAW

On August 2, 2000, the German Parliament (Bundestag) established the Foundation as an instrumentality of the Federal Republic, pursuant to the "Law on the Creation of a Foundation 'Remembrance, Responsibility and Future'"

[10] U.S. Department of State, Press Statement, *Holocaust Insurance Agreement Signed* (Oct. 17, 2002), *available at* http://www.state.gov/r/pa/prs/ps/2002/14455.htm.

(Gesetz zur Errichtung einer Stiftung "Errinnerung, Verantwortung und Zukunft" or "Foundation Law").[11] The Foundation Law incorporates and implements German obligations under the Executive Agreement and sets forth guidelines for the administration of the Foundation. Pursuant to the law, the Foundation was endowed with roughly $5 billion, half contributed by the Federal Republic and half on a voluntary basis by thousands of German companies. The Foundation has already provided payments to over a million aging victims of National Socialist oppression and persecution.

Consistent with German and U.S. foreign policy, the Foundation Law establishes the Foundation as the exclusive forum for all Nazi-era claims against German companies and excludes further claims. Foundation Law, § 16(1). The Federal Republic maintains legal supervision over the Foundation. *See* Foundation Law, § 8(1); *see also* Executive Agreement, art. 1(3) (ER 822).

On August 17, 2000, one month after the Executive Agreement was signed, the U.S. Department of State issued an official statement in recognition of the Federal Republic's passage of the Foundation Law:

> The United States welcomes German Acting President Biedenkopf's signature on August 12 of a law establishing the foundation "Remembrance, Responsibility and Future." . . . The United States believes that the foundation should be the exclusive remedy for the resolution of all asserted claims against German companies arising from the Nazi era. Claims covered by the law include slave and forced labor, aryanization, medical experimentation and other cases of personal injury and damage to or

[11] *See* German Federal Law on the Creation of a Foundation "Remembrance, Responsibility and the Future," Bundesgesetzblatt: BGBl. 2000 I 1263, *available at* http://www.stiftung-evz.de/fremdsp/englisch/ st_ges_en.html ("Foundation Law").

> loss of property including banking assets *and insurance policies.*[12]

ARGUMENT

I. THE HVIRA HAS EXTRATERRITORIAL EFFECTS THAT EXTEND TO GERMANY.

The HVIRA impermissibly imposes California's regulatory power on foreign insurance companies located in Germany and elsewhere in Europe. The HVIRA requires insurers doing business in California publicly to disclose private personal information regarding all insurance policies that these insurers or any of their "related" companies issued in Europe between 1920 and 1945. The statute extends to all related European companies, even those that have never done business in California and those with relationships to California licensees that began long after 1945. HVIRA §§ 13804, 13806 (SER 520-21, 523). It covers all policies from the relevant 25-year period, not merely those of known Holocaust victims. The effect is to compel insurance companies to place in a public register personal and confidential information relating not only to policies held by victims of the Holocaust, but also to millions of policies held by individuals who were not victims. Current estimates suggest that less than 1 percent of all insurance policies issued by German companies during the period 1920 to 1945 were issued to Holocaust victims, and in any regard most of those policies issued to Holocaust victims have already been compensated pursuant to prior German compensation and restitution measures.

Related California legislation purports to create a California cause of action to recover on Holocaust-era insurance claims, establishes venue and jurisdiction in

[12] Statement by Philip T. Reeker, Deputy Spokesman, *German Foundation for Holocaust Era Claims Established* (U.S. Dep't of State, Office of the Spokesman, Aug. 17, 2000), *available at* http://www.usembassy.de/policy/holocaust/welcomelaw.htm (emphasis added).

California state courts, and purports to waive applicable statutes of limitation.

By granting the California Commissioner of Insurance the power to revoke the license of in-state insurers that fail to disclose private information in the hands of their European affiliates, the HVIRA attempts to coerce German insurers in Germany to act in certain ways that are inconsistent with German law and German sovereign interests.

A. The HVIRA Infringes Germany's Sovereign Authority To Regulate The Insurance Industry In Germany.

The Federal Republic has the exclusive and sovereign authority to prescribe laws applicable to German insurance companies operating in Germany. The Federal Republic has enacted an extensive statutory framework, which includes the Insurance Supervision Law (Versicherungsaufsichtsgesetz or "VAG"), to regulate German insurers. The VAG designates the Federal Financial Services Supervisory Office (Bundesanstalt für Finanzdienstleistungsaufsicht or "BAFIN," formerly known as Bundesaufsichtsamt für das Versicherungswesen (BAV)), as the competent supervisory body of the federal government for the regulation of insurance in Germany and grants the BAFIN significant powers to regulate the German insurance market. §§ 81-103 VAG.

The Federal Republic has, in addition, enacted and is responsible for enforcing extensive privacy laws such as the Federal Data Protection Law (Bundesdatenschutzgesetz or "BDSG"), which applies to German insurance companies in Germany. The Federal Republic, like many other European countries, has "data protection" laws that typically are more stringent than in the United States and reflect a strong public policy against the dissemination of private information in corporate or government hands. In particular, the BDSG prohibits the disclosure of personal data, including the

disclosure of information regarding insurance policy records without the express authorization of policyholders or their beneficiaries. § 28(2) Nr. 1b BDSG.

The HVIRA contravenes German law. By threatening to suspend the licenses of California insurance companies unless "related" insurance companies in Germany agree to the publication in California of detailed information concerning German and other European policies, the HVIRA seeks to supplant the Federal Republic's regulation of insurance companies in Germany, directly implying that the Federal Republic cannot be trusted to perform its sovereign duties. Furthermore, the HVIRA requires California affiliates to disclose information held by "related" German insurance companies notwithstanding applicable German privacy laws governing disclosure of the required information. *See id.* As the Federal Republic advised the Ninth Circuit[13] (although the Ninth Circuit appears to have ignored this information), the relevant German regulatory agencies have concluded that compliance by German companies with the HVIRA would cause them to violate German law and thereby subject them to civil and criminal penalties.[14] As the Federal Republic informed the Ninth Circuit, these are correct conclusions under German law.[15]

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[13] Brief Amicus Curiae Supporting Affirmance of Summary Judgment for Plaintiffs-Appellees/Cross-Appellants 15-17 (filed Mar. 18, 2002) ("March 18, 2002 FRG Brief").

[14] The District Government of Cologne, Germany, concluded on May 16, 2000, that under the BDSG "the transmission of data in the form of lists pertaining to all policyholders from 1920-1945 . . . *is not permissible*." (ER 1182 (emphasis added).)

[15] March 18, 2002 FRG Brief 17.

B. The HVIRA Creates Conflicting Legal Duties For German Insurance Companies Doing No Business In California.

The HVIRA's conflict with German law has the practical effect of forcing German insurance companies, who understandably are not indifferent to the fate of their California affiliates, to choose between compliance with California law on the one hand and compliance with German laws on the other. If German companies provide the requested information, they do so in violation of German law and, therefore, subject themselves to criminal and civil penalties in Germany. If German insurance companies decline to comply with the HVIRA's publication requirements, the California insurance companies to which they now are affiliated (some 55 to 80 years after the issuance of the policies) will lose their licenses to do business in California, without a meaningful hearing.

By threatening to suspend the licenses of California insurers based on the conduct of "related" insurers in Germany, the HVIRA has the practical effect of extraterritorially affecting conduct of German companies not doing business in California. Indeed, the HVIRA's primary function is to extend California's regulatory power to cover insurance companies that have no nexus with the State of California: German (and other European) insurance companies that issued policies in Europe between 1920 and 1945, have never done business in California, and are under the regulatory jurisdiction of Germany (and other European sovereign nations). Absent any effect in Germany and elsewhere in Europe, the HVIRA would serve no useful purpose in California's campaign to establish itself as a litigation haven for Holocaust-related claims.

C. The HVIRA Has The Practical Effect Of Controlling Conduct Outside California.

The HVIRA directly affects insurance companies located in Germany by compelling them to search their records and produce the private information that California seeks to make public. Using regulatory and economic coercion, the State of California effectively induces German companies doing business in Germany to disclose information that is otherwise protected against disclosure by German law. The HVIRA's net effect, and in fact its very purpose, is to enable California regulators to reach into German jurisdiction to obtain information that: (1) relates to transactions that occurred in Germany between German parties; (2) is subject to German law; and (3) is in the custody of German insurers incorporated in Germany.

The Ninth Circuit erred in asserting that the HVIRA has no "direct effect" in Germany merely because the State of California does not directly impose sanctions on German companies for noncompliance. 296 F.3d at 842. The threat of license revocation for noncompliance has the practical effect of penalizing German companies for noncompliance. The Ninth Circuit's remark that "foreign insurers would bear no burden resulting from their affiliates' compliance with HVIRA," 296 F.3d at 840, is stunningly formalistic. And it ignores the Federal Republic's amicus submission that the unlawful disclosure of private insurance data would subject German companies to civil and criminal penalties in Germany.

The Ninth Circuit further discounted the HVIRA's extraterritorial effects in Germany by implying that they are merely incidental. 240 F.3d at 746-47. This assessment mischaracterizes the HVIRA. The HVIRA is not a law of general applicability that happens to have incidental effects on German companies in Germany. There is nothing "incidental" about the HVIRA's extraterritorial impact in Germany, which the California Legislature sought to

produce.[16] To the contrary, the law is expressly directed at companies that issued insurance policies in Europe from 1920 to 1945. The vast majority of these companies are located in Europe, and many are in Germany.

It is precisely this type of extraterritorial regulation that the Federal Republic and the United States sought to pretermit when, in July 2000 (not long after the HVIRA was passed), they culminated 55 years of diplomatic practice by entering into the U.S.-German Executive Agreement.

II. THE HVIRA INTERFERES WITH THE U.S.-GERMAN EXECUTIVE AGREEMENT AND THE GERMAN FOUNDATION LAW.

The historic U.S.-German Executive Agreement resulted from nearly two years of negotiations. As noted, it recalls "that for the last 55 years the parties have sought to work to address the consequences of the National Socialist era and World War II though political and governmental acts between the United States and the Federal Republic of Germany" and notes "that this Agreement and the establishment of the Foundation represent a fulfillment of these efforts." *Id.*, preamble (ER 821). It states that the claims process established under the Foundation is "to be the exclusive remedy and forum for the resolution of all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II." *Id.*, art. 1(1) (ER 821). The countries also expressed their intent for the U.S.-German Agreement to achieve "all-embracing and enduring legal peace for German companies with respect to the National Socialist era and World War II." *Id.*, preamble, art. 3(1) (ER 824). The Foundation Law similarly provides that the Foundation is the exclusive forum. *See* Foundation Law, § 16(1).

The HVIRA is directly and self-consciously at odds with the Executive Agreement and Foundation Law. The HVIRA

[16] *See, e.g.*, Cal. Ins. Code § 13801(d)-(f).

is part of a legislative effort to create an alternative, litigation-based California-centric scheme to address the same set of Holocaust-related issues, i.e., outstanding claims against Germany and German companies, that were addressed and resolved by the Executive Agreement and Foundation Law.

The HVIRA threatens a fundamental premise of the Executive Agreement and Foundation Law: that the Foundation is the exclusive forum for addressing claims asserted against German companies, including claims on any remaining unpaid insurance policies. The HVIRA, which is part of a statutory scheme to facilitate the litigation of Holocaust-era claims in California state courts, also undermines the two countries' clear intent to achieve "all-embracing and enduring legal peace" for German companies.

By imposing California law on the process of post-war restitution and compensation—in direct conflict with an international agreement entered into by the United States and a German law enacted in accordance with that agreement—the HVIRA impermissibly intrudes on the province of nations. California's purported regulation of foreign conduct with respect to Holocaust-era claims has a destabilizing effect on the careful and precarious balance that has been achieved by the Berlin Agreements. That balance is best described in a letter dated June 16, 2000, from the White House to the Federal Republic. It states:

> We are now on the verge of an historic accomplishment .... We have agreed upon a DM 10 billion capped fund for the resolution of slave and forced labor claims and for all other wrongs committed by German companies arising out of the Nazi-era. ... Let us reiterate ... that the President and the Administration are committed ... to enduring and all-embracing legal peace for German companies, for present and future cases, for consensual and non-consensual cases. ... We have

> worked together with you to develop this historic German initiative. We do not wish to take any action that would perpetuate present or future cases. Indeed, it will be the enduring and high interest of the United States to support efforts to achieve dismissal of all World War II-era cases, and the United States will act accordingly. To do otherwise would threaten the very Foundation Initiative to which all of us, including the President and the Chancellor, have devoted so much time and effort.[17]

Despite the express wishes of the White House, California seeks to enforce a law that threatens the Foundation Initiative. By upholding the HVIRA, the Ninth Circuit has permitted California to interfere with U.S. foreign policy and effectively regulate foreign commerce. Such activity adversely affects the sovereign interests of the Federal Republic and the United States.

Left uncorrected, the Ninth Circuit's decisions will serve to invite other states to substitute their own foreign policy objectives for those of the United States, opening the door to intrusive and potentially inconsistent regulation of insurance companies in Germany by 50 separate states. At least six states in addition to California (Florida,[18] Maryland, Minnesota, New York, Texas, and Washington) have enacted legislation—and at least four other states (Illinois, Massachusetts, New Jersey, and Rhode Island) introduced legislation to regulate (in potentially inconsistent ways) foreign insurance companies that issued policies in Europe

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[17] Letter from Samuel R. Berger, Assistant to the President for National Security Affairs, and Beth Nolan, Counsel to the President, to Michael Steiner, National Security Assistant to the Chancellor, dated June 16, 2000, *available at* http://www.state.gov/www/regions/eur/holocaust /000616_letter.pdf.

[18] The Eleventh Circuit struck down substantially identical legislation enacted in Florida. *See Gerling Global Reinsurance Corp. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001).

over 55 years ago. Several of these states took legislative action soon after the Ninth Circuit's first decision in this case. Like the HVIRA, such legislation jeopardizes U.S.-German foreign relations.

III. The HVIRA Creates Tension In U.S.-German Relations.

California's HVIRA impairs the ability of the Federal Republic to maintain productive relations with the United States. It frustrates the United States' ability to speak with one voice on matters of foreign affairs and foreign commerce. The Federal Republic, the United States, and other sovereign nations reached an international consensus on the basis of diplomatic, economic, and other foreign policy factors—factors which California has no capacity to weigh and no motivation to consider. As the present dispute illustrates, California has independent policy interests that do not coincide with those of the United States, let alone the Federal Republic and other sovereign nations.

By undermining the U.S.-German Executive Agreement and German legislation enacted in accordance with that agreement, the HVIRA offends German and U.S. sovereignty. California's law is particularly offensive to Germany in light of the law's clear implication that the Federal Republic is either incapable or unwilling to achieve the proper resolution of unpaid Holocaust-era insurance claims. Such an implication contrasts starkly with reality. The Federal Republic has long accepted responsibility for the sovereign task of compensating victims of the Holocaust, that responsibility has been recognized by the United States and the entire international community, and Germany's efforts have been commended by the United Nations.

The Ninth Circuit's decisions, like the HVIRA, demonstrate equal disregard for the sovereign authority of nations to settle post-war restitution and compensation issues through the conduct of international diplomacy, as opposed to extraterritorial regulation and local litigation. The

decisions failed even to acknowledge, let alone discuss, the sovereign positions of the Federal Republic and the United States, notwithstanding the fact that the two governments have clearly articulated foreign policy interests in the matter.

The puzzling assertions in the panel's first decision that (a) "there is no evidence that HVIRA would be applied in a way that would implicate the diplomatic concerns mentioned in *Zschernig*,"[19] and (b) "HVIRA and the executive branch initiatives [including the U.S.-German Executive Agreement] share the same policy objective, although they seek to achieve that policy objective by varying techniques"[20] are erroneous. It defies logic to conclude that a policy of the United States Government expressly recognizing that it is in the United States' foreign policy interests for the German Foundation to be the *exclusive remedy and forum* and seeking to end all litigation in United States courts of National Socialist era claims shares the same objective as a California regulatory statute that seeks to force publication of information to set up the California state courts as a second forum for contentious litigation of the same claims. Nor is it rational to conclude that the California statute does not implicate United States Government diplomatic concerns that mirror those of the Federal Republic. As the amicus brief of the United States clearly stated, "the premise of the California legislation is in direct conflict with that of United States foreign policy."[21] The same holds true for the Federal Republic of Germany.

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[19] *Gerling Global Reinsurance Corp. of America v. Low*, 240 F.3d 739, 753 (9th Cir. 2001) (citing *Zschernig v. Miller*, 389 U.S. 429 (1968)).

[20] *Id.* at 750.

[21] Brief for Amicus Curiae the United States of America in Support of Rehearing *En Banc* (filed Aug. 5, 2002) (ER 1255-77).

CONCLUSION

For the reasons set forth above, the Federal Republic of Germany respectfully urges the Court to reverse the decisions of the Ninth Circuit and to declare the HVIRA unconstitutional.

Respectfully submitted,

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IN THE

Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION *et al.*,
Petitioners,

v.

JOHN GARAMENDI, COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE ORGANIZATION FOR INTERNATIONAL INVESTMENT IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

No. 02-722

AMERICAN INSURANCE ASSOCIATION *et al.*,
Petitioners,

v.

JOHN GARAMENDI, COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE ORGANIZATION FOR INTERNATIONAL INVESTMENT IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.3(a) of the Rules of this Court, the Chamber of Commerce of the United States and the Organization for International Investment respectfully submit this brief *amici curiae* in support of Petitioners.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Further, no counsel for any Petitioner or Respondent authored this brief in whole or in part. This brief is filed under Supreme Court Rule 37.3(a) with the consent of the parties, and copies of the letters of consent have been filed with the Clerk of the Court.

INTERESTS OF THE *AMICI CURIAE*

Amici curiae are business associations that have a substantial interest in ensuring stable and predictable legal regimes affecting international trade and investment.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation, representing an underlying membership of more than three million U.S. businesses and organizations of every size, in every business sector, and from every region of the country. While most of the country's largest companies are Chamber members, 96% of its members are small businesses with fewer than 100 employees. Chamber members transact business in all or nearly all of the United States, as well as in a large number of countries around the world. An important function of the Chamber is to advocate its members' interests in matters of national concern before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government.

The Organization for International Investment ("OFII") is the largest business association in the United States representing the interests of U.S. subsidiaries of international companies. OFII's member companies employ hundreds of thousands of workers in thousands of plants and locations throughout the United States, as well as in many foreign countries, and are affiliates of companies transacting business in countries around the world.

Both organizations regularly file briefs as *amici curiae* in cases such as this one that raise issues of vital concern to the business community. Together they filed a brief as *amici curiae* in this Court in *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000), an important precursor to the present litigation. In this case, they again seek to assist the Court in exploring the Constitution's limits on the role of states in the conduct of foreign affairs and foreign commerce.

Chamber and OFII members rely on a stable framework of international laws and agreements, made possible by United States diplomatic efforts, that allow them to conduct business around the globe. In their view, the decisions below put that framework at risk, by permitting states to legislate beyond their boundaries in a deliberate effort to influence delicate international relations. The decisions thereby threaten diplomatic efforts supporting business and investment, and constitute a significant hindrance to the foreign commerce on which *amici*'s members, and the U.S. economy, depend.

SUMMARY OF THE ARGUMENT

Amici urge the Court to reverse the decisions of the Ninth Circuit in *Gerling Global Reinsurance Corp. of America* v. *Low*, 240 F.3d 739 (9th Cir. 2001) ("*Gerling I*") and 296 F.3d 832 (9th Cir. 2002) ("*Gerling II*"). These decisions conflict with precedents of this Court regarding the exclusive foreign affairs powers of the federal government and the limits on a state's power to regulate beyond its borders.

In an attempt to implement its own foreign policy, California has enacted an insurance statute that has impaired U.S. foreign policy negotiations and that continues to threaten a delicate international settlement. Officials of the U.S. government serving in two administrations have pursued a federal foreign policy of promoting the international settlement of Holocaust-era claims. That policy reflects a careful foreign policy judgment in which the Executive Branch balanced, among other factors, the commercial and diplomatic importance of relations with major European allies, the strain that Holocaust-era claims against German and other European companies places on these important relations, and the need for equitable treatment of Holocaust-era victims.

Apparently displeased with the decisions of the Executive Branch in assessing these interests, California seeks to alter

the international agreements to which the Executive has pledged the Nation. The Holocaust Victim Insurance Relief Act of 1999, Cal. Ins. Code §§ 13800-13807 ("HVIRA"), requires foreign insurance companies to provide information about insurance policies issued in Europe between 1920 and 1945, on pain of their California affiliates' exclusion from business in that state. California imposed this requirement in conjunction with other measures in order to enable claimants to pursue Holocaust-era insurance claims in the California courts. In seeking to augment the international remedies the federal government negotiated for the Nation as a whole, California is upsetting a delicate foreign policy calculus, despite its lack of responsibility (or political accountability) for managing the many-faceted aspects of the Nation's relations with important foreign allies. This is precisely the type of state interference with foreign affairs that the Framers, and this Court, have condemned as fundamentally inconsistent with our federal system.

Accordingly, this Court should reverse the decisions below and confirm that the Nation's foreign policy remains the exclusive province of the federal government. This Court recently confirmed that the enactment of the nation's foreign policy in a federal statute or treaty preempts a state statute on the same subject. See *Crosby*, 530 U.S. at 373-74. Here, the Court similarly should hold that, even in the absence of a statute or treaty, federal power over foreign affairs prevents state legislators from altering the outcome of negotiations between the United States, six foreign governments, and numerous non-governmental actors.

In addition, this Court should affirm the Constitution's limits—whether imposed by the Due Process Clause or the foreign Commerce Clause—on state legislators' power to regulate subjects that lie beyond state, or United States, borders. Statutes like HVIRA use U.S. corporate affiliations as a pressure point to extend a state's regulatory reach far beyond its own territory, threatening critical cross-border

commercial relationships. They offer foreign and out-of-state businesses a lose-lose choice between, on the one hand, abandoning their corporate affiliates and the markets in such states, and, on the other, subjecting themselves to the regulatory power of state legislatures solely by virtue of those affiliations.

ARGUMENT

I. HVIRA INTERFERES WITH FOREIGN POLICY.

The federal government has exclusive power over the conduct of foreign affairs. In this case, it has exercised that power not through statute or treaty, but by negotiating executive agreements with foreign nations that led to the formation of two international organizations to resolve Holocaust-era insurance claims: the Remembrance, Responsibility, and the Future Foundation ("Foundation") and the International Commission on Holocaust Era Insurance Claims ("ICHEIC"). The United States also negotiated the Swiss-U.S. Joint Agreement with an "Action Plan" for future settlement, and Austria's "Reconciliation, Peace, and Cooperation Fund." California's HVIRA impermissibly interferes with these federal foreign policy initiatives—and with United States relations with Germany, Austria and Switzerland.

A. The International Process For Resolving Holocaust-Era Claims Represents An Exercise Of The Executive's Plenary Authority Over The Nation's Complex Commercial And Diplomatic Relations With Important European Allies.

This Court has long recognized that the federal government "is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. 'For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.'" *Hines* v.

Davidowitz, 312 U.S. 52, 63 (1941) (quoting *Chinese Exclusion Case*, 130 U.S. 581, 606 (1889)). Thus, "complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states." *United States* v. *Belmont*, 301 U.S. 324, 331 (1937).

The Court has likewise recognized "'the generally accepted view that foreign policy was the province and responsibility of the Executive.'" *Department of Navy* v. *Egan*, 484 U.S. 518, 529 (1998) (quoting *Haig* v. *Agee*, 453 U.S. 280, 293-94 (1981)); see also *First Nat'l City Bank* v. *Bano Nacional de Cuba*, 406 U.S. 759, 767 (1972) (plurality opinion) (Rehnquist, J.) ("this Court has recognized the primacy of the Executive in the conduct of foreign relations"). Indeed, "[i]n this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation." *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). Thus, the President possesses "the very delicate, plenary and exclusive power ... as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress." *Id.* at 320.

The President may exercise this power not only by negotiating treaties, but also by entering into executive agreements with other nations, which have the same preemptive effect on state laws as treaties. *Belmont*, 301 U.S. at 331; L. Tribe, *American Constitutional Law* § 4-4, at 648 (3d ed. 2000). This Court noted in *Zschernig* v. *Miller*, 389 U.S. 429 (1968), that, "even in absence of a treaty, a State's policy may disturb foreign relations." *Id.* at 441. Under international law, an executive agreement invokes the international responsibility of the United States to the same degree as a treaty. Internationally binding executive agreements like those concluded by the United States with Germany, Switzerland, and Austria require the same

protection from state-level intrusions that treaties and statutes enjoy.

Of late, presidents have exercised their "delicate, plenary and exclusive power," *Curtiss-Wright*, 299 U.S. at 320, to address a number of extremely "important, complicated, delicate and manifold problems," *id.* at 319, in our foreign relations with Germany and other important European allies. The United States recognized the pressing need for resolution of various Holocaust-era claims against Germany and other countries. Presidents have also recognized, however, that this important goal cannot be pursued in a vacuum, without consideration of other, similarly compelling national interests. Rather, the Executive has sought to strike a careful balance between the goal of affording justice to victims of Nazism and the Nation's other broad and complex interests in normalized and strong relationships with important European trading partners and diplomatic allies.

During the late 1990s, President Clinton and the United States government participated in a major effort to settle a variety of outstanding Holocaust-era claims. For almost two years, U.S. officials negotiated with representatives of the governments of Germany, Belarus, the Czech Republic, Poland, Russia, and the Ukraine, along with the Conference on Jewish Material Claims Against Germany and attorneys for plaintiffs and defendants in a series of related domestic proceedings, in search of a comprehensive and just settlement to Holocaust-era claims.[2] According to participants, the negotiations were "lengthy, hard-fought" and "'extremely difficult.'"[3] Success came only from "compromises ... made

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[2] *See In re Nazi Era Cases Against German Defendants Litig.*, 198 F.R.D. 429, 431-32 (D.N.J. 2000) ("*In re Nazi Era Cases*"). The Conference on Jewish Material Claims Against Germany is an umbrella group representing "numerous international Jewish non-governmental organizations." *Id.* at 432.

[3] *Id.*

by 'all parties'" following "'vigorous ... bargaining' between all present."[4] President Clinton and German Chancellor Gerhard Schroeder were personally involved in these negotiations.[5]

These delicate negotiations gave rise to the Foundation, established under German law and officially recognized in an Executive Agreement between the United States and Germany.[6] The Foundation's purpose is to settle Holocaust-era claims related not only to insurance but also to slave labor, forced labor, medical experimentation, placement of children in children's homes where they suffered terrible abuse, and property loss.[7]

In the Foundation Agreement, the United States emphasized its commitment to "legal peace" for the German government and German companies. A prerequisite to payment of any claims by the Foundation was dismissal of related pending actions against German defendants in U.S. courts.[8] In addition, the United States agreed to file a statement of interest in all Holocaust-era actions subsequently brought in the United States to the effect that "dismissal ... would be in the foreign policy interests of the United States."[9] Subsequently, the Bush Administration demonstrated the Executive's continuing commitment to this means of

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[4] *Id.*

[5] *Id.*

[6] Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Concerning the Foundation "Remembrance, Responsibility and the Future," July 17, 2000, 39 I.L.M. 1298 ("Foundation Agreement").

[7] *See* Foundation Agreement, Annex A (Principles Governing the Operation of the Foundation), 39 I.L.M. at 1300-03.

[8] *See In re Nazi Era Cases*, 198 F.R.D. at 432.

[9] *See* Foundation Agreement, Annex B (Elements of U.S. Government Statement of Interest), 39 I.L.M. at 1303.

resolving Holocaust-era claims by facilitating negotiations among ICHEIC, the Foundation, and the German Insurance Association over certain claims handling procedures.[10]

U.S. negotiations also yielded bilateral arrangements with Austria and Switzerland. The United States and Austria entered into an Executive Agreement recognizing Austria's "Reconciliation, Peace, and Cooperation Fund," established to pay Holocaust-era slave labor claims against Austria and Austrian companies in exchange for the United States' commitment to "legal peace."[11] The United States and Switzerland issued an "Action Plan" committing the United States to "'call on ... State insurance Commissioners and State legislative bodies to refrain from taking unwarranted investigative initiatives or from threatening or actually using sanctions against Swiss insurers.'"[12]

These U.S. agreements on the international mechanisms for compensation represent complex foreign policy judgments that balance the interests of the various stakeholders and those of the Nation as a whole.[13] Such balancing is characteristic of

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[10] M. Kniazkov, *U.S. Agrees to Facilitate Talks on Holocaust-Era Claims*, Agence France-Presse, July 18, 2001.

[11] Agreement Between the Austrian Federal Government and the Government of the United States of America Concerning the Austrian Fund "Reconciliation, Peace, and Cooperation," Oct. 24, 2000, 40 I.L.M. 523 (hereinafter "Fund Agreement").

[12] *Gerling I*, 240 F.3d at 750.

[13] *See, e.g.*, Foundation Agreement, 39 I.L.M. at 1304 ("[U.S.] interests include the ... fair and prompt resolution of the issues involved in these lawsuits to bring some measure of justice to the victims of the National Socialist era and World War II in their lifetimes; ... the furtherance of the close cooperation this country has with our important European ally and economic partner, Germany; ... maintaining good relations with Israel and other Western, Central, and Eastern European nations, from which many of those who suffered during the National Socialist era and World War II come; and ... achieving legal peace for asserted claims against German companies arising from their involvement in ... World War II").

foreign policy. The United States defines its relations with its European allies not through single-issue choices but, rather, through balancing among hundreds of delicate diplomatic and commercial decisions that are coordinated at the highest levels of government. Our government's agreement to a specific mechanism for Holocaust-era claims and its commitment to "legal peace" in the United States with respect to such claims are important components in this matrix.

B. HVIRA Impermissibly Interferes With The Executive's Conduct Of Foreign Affairs.

This Court has stressed that "federal power in the field affecting foreign relations [must] be left *entirely free* from local interference." *Hines*, 312 U.S. at 63 (emphasis added); see also *Belmont*, 301 U.S. at 331 (federal government's "power over international affairs ... is not and cannot be subject to *any* ... interference on the part of the several states") (emphasis added). HVIRA plainly runs afoul of this proscription. The statute is designed to alter the careful balance struck by the President in the complex, U.S.-led negotiations.

As the Ninth Circuit itself recently explained, California "was dissatisfied with how the federal government chose to address the various wartime injuries suffered by victims of the Nazis and their allies."[14] HVIRA was enacted in conjunction with other measures that, collectively, seek to provide Holocaust-era insurance claimants with a comprehensive *alternative* to the international claims process that the President negotiated on behalf of the United States. Thus, Cal. Civ. Proc. Code § 354.5 provides claimants with a cause of action and tolls the statute of limitations, and Cal. Ins. Code § 790.15 provides for the suspension of an insurer's

[14] *Deutsch* v. *Turner Corp.*, 317 F.3d 1005, 1026 (9th Cir. 2003) (finding Cal. Code Civ. Proc. § 354.6, which created a cause of action and tolled statute of limitations for Holocaust-era slave labor claims, unconstitutional under foreign affairs power).

license if the insurer or an affiliate fails to pay a claim. HVIRA mandates the collection of evidence concerning Holocaust-era insurance claims in order to ensure that victims can take advantage of these alternative judicial and administrative remedies that California has made available.[15] California openly acknowledged that HVIRA is intended to "encourage the development of a resolution to these issues through the international process *or through direct action by the State of California, as necessary*." Cal. Ins. Code § 13801(f) (emphasis added).

In concluding that California's "direct action" on a sensitive foreign affairs matter did not interfere with the President's conduct of foreign relations, the Ninth Circuit reasoned that HVIRA "seeks only to obtain information about conduct in another jurisdiction" and does not obligate "'European insurance companies to pay or not to pay claims on European policies.'" *Gerling I*, 240 F.3d at 745. But the impact of HVIRA on the U.S.-led negotiations and on the Nation's ongoing relations with important European allies cannot be so neatly cabined. Our allies perceived, correctly, that HVIRA's information-gathering requirements are part and parcel of a legislative scheme designed to promote Holocaust-era insurance litigation outside the internationally negotiated process for the resolution of such claims. That perception indisputably interfered with the Executive's efforts to balance the Nation's "complicated, delicate and manifold"

[15] HVIRA's legislative history underscores that its purpose is to facilitate litigation. According to its author, HVIRA "ensure[s] that Holocaust victims or their heirs can take direct action on their own behalf with regard to family-owned insurance policies." *Insurance Claims of Holocaust Victims: Hearing on A.B. 600 Before the Senate Floor*, 1999-2000 Sess. (Cal. Sep. 3, 1999). Similarly, then-Governor Pete Wilson referred to a HVIRA predecessor bill as one means "to bring prompt payment to those who have been denied justice for far too long." *Id.* (referring to A.B. 1715).

interests with important European allies, and is likely to complicate ongoing relations with those countries.

As early as November 1999, then-Deputy Treasury Secretary Stuart Eizenstat wrote directly to California Governor Gray Davis and then-Insurance Commissioner Quackenbush stating that "actions by California, pursuant to this law, have already potentially damaged and could de[r]ail both a settlement of forced and slave labor negotiations and the progress already achieved by the International Commission on Holocaust Era Insurance Claims."[16] In fact, California's legislation weakened U.S. diplomatic leverage in securing the international agreements settling the insurance claims. When the United States and Germany signed the Foundation Agreement in July 2000, some insurance and other companies funding the Foundation initially were hesitant to fulfill their large monetary obligations in light of the threats to legal peace from laws such as HVIRA.[17]

Our allies' perceptions of HVIRA, moreover, will continue to affect and impair the Executive's conduct of foreign affairs. HVIRA burdens foreign companies in order to foster a goal—U.S. litigation over Holocaust-era insurance claims—that is antithetical to the "legal peace" those companies, and their governments, sought to obtain through negotiations with the United States. Such burdens will inevitably cause tensions and frictions, if not worse, in the Nation's relations with its important allies. And HVIRA will likely complicate future negotiations with these and other, countries, who may well question the Executive's ability to fulfill its promises, and therefore may be reluctant to reach agreements with the United States or may only do so on more onerous terms. Indeed, the Executive Branch has consistently maintained, in

[16] Letter from Eizenstat, Deputy Treasury Secretary, to Davis, Governor (Nov. 30, 1999), *reproduced at* Pet. App. 124a.

[17] *See, e.g.*, Henry Weinstein, *Holocaust Survivors Settlement Hits Snag*, L.A. Times, Mar. 10, 2001, at A15.

public statements and in this litigation, that HVIRA is hindering the nation's foreign policy interests.[18]

These real world impacts—not a formalistic parsing of HVIRA's provisions—must govern this Court's assessment of the law's interference with the President's ability to conduct foreign affairs. And each of these real-world forms of interference with the conduct of foreign affairs is constitutionally intolerable.

This Court has repeatedly held that, when the national government strikes a careful balance among national concerns in the area of foreign affairs, that balance preempts state action in the same area. Thus, in *Hines*, the Court struck down Pennsylvania's alien registration laws based on its finding that Congress, in adopting a federal registration requirement, had "steer[ed] a middle path," 312 U.S. at 73, between national security needs and the recognition that our Nation's treatment of aliens implicates "[o]ne of the most important and delicate of all international relationships." *Id.* at 64. Similarly, in *Crosby* the Court held that a federal statute that restricted the range of economic pressure that could be brought to bear against Burma demonstrated "that Congress's calibrated Burma policy is a deliberate effort 'to steer a middle path,'" and that such a policy preempted state laws designed to influence Burma through economic

[18] *Cf. Banco Nacionale de Cuba*, 406 U.S. at 768 (plurality opinion) (Rehnquist, J.) (relying on representations of the Executive Branch in deciding whether failure to apply the act of state doctrine would interfere with the Nation's foreign policy). In *Barclays Bank PLC* v. *Franchise Tax Board*, 512 U.S. 298 (1994), this Court declined to rely on Executive assessments that California's taxation of foreign-based multinationals so interfered with the Nation's ability to "speak with one voice" that it violated the Foreign Commerce Clause. Because the power to regulate foreign commerce belongs to Congress, the Court stressed that the views of Congress, rather than the Executive, were determinative. *Id.* at 328-30. Here, by contrast, HVIRA interferes with the Executive's plenary authority to conduct foreign affairs, and the Executive's views must be accorded great weight.

sanctions. 530 U.S. at 377-78 (quoting *Hines*, 312 U.S. at 73).

These same principles necessarily apply to, and control, this case. In conducting multi-faceted negotiations with major trading partners and military allies, the Executive struck a carefully calibrated balance between the Nation's strong interest in compensation for Holocaust-era victims, and its other diplomatic and economic interests in Europe. Under our system of government, California cannot second-guess that balance and alter one aspect of a complex negotiation. The states, which bear no responsibility for managing our Nation's relations with other countries, are not entitled to alter a Presidential bargain with other countries. As this Court observed with respect to a different attempt by California to intrude into the realm of international relations, "If [the United States] should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?" *Chy Lung* v. *Freeman*, 92 U.S. 275, 279 (1875); see also *The Federalist No. 80*, at 535-36 (A. Hamilton) (J. Cooke ed. 1961) ("[T]he peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members.") (emphasis in original).

Amici's interests in preserving the federal government's plenary authority over foreign policy are by no means academic. The Chamber, OFII, and their members rely on the federal government, and the Executive in particular, to negotiate a strong, dependable, and consistent international legal regime that will facilitate the growth and viability of the global economy. If the federal government cannot make credible commitments to its foreign counterparts, and cannot implement a carefully calibrated mix of political and economic carrots and sticks in its foreign policy initiatives, its ability to carry out that important mission is gravely compromised—and U.S. and global commercial actors depending on those initiatives suffer.

Accordingly, where, as here, state action conflicts with the foreign policy of the federal government, as evidenced by formal international negotiations and signed executive agreements, that state law must be struck down. Any other result would expose the Executive's conduct of the Nation's foreign relations to the prospect of repeated and destructive intrusions by state initiatives—intrusions that are fundamentally inconsistent with our system of government.

II. HVIRA IMPERMISSIBLY REGULATES BEYOND THE STATE'S OWN, AND THE NATION'S, BORDERS.

The constitutional framework ensures federal control over the conduct of foreign affairs not only through its exclusive grant of foreign policy-making authority to the federal government, but also through the independent limitations that the Constitution sets on state regulatory power. Here, two such limitations lead to the same result: HVIRA cannot stand.

Due process requires that the extent of a state's regulatory authority must not exceed the extent of that state's legitimate interests. A state does not have the power to regulate a foreign (or domestic) person or subject matter if they lack sufficient contacts with the state. See, *e.g.*, *Allstate Ins. Co* v. *Hague*, 449 U.S. 302, 310-13 (1981); *International Shoe Co.* v. *Washington, Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945); *Home Ins. Co.* v. *Dick*, 281 U.S. 397, 407-08 (1930). Here, European insurers and their Holocaust-era policies have no connection to California, other than through their corporate affiliates. If mere corporate affiliation, as HVIRA broadly defines it, is grounds for instrusive state regulation over foreign companies, then the concept of "minimum contacts" has lost its meaning.

Second, the dormant Commerce Clause precludes a state from regulating commerce that takes place outside its territory. See *Healy* v. *Beer Inst., Inc.*, 491 U.S. 324, 336, 338 (1989); *Edgar* v. *MITE Corp.*, 457 U.S. 624, 642-43

(1982). That rule has all the more force when foreign, rather than merely interstate, commerce is impaired. Cf. *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 96 (1984). HVIRA reaches across the country, and across the Atlantic, to dictate requirements to foreign companies regarding foreign insurance policies issued to foreigners. Its effect on commerce outside California, not to mention its effect on the Nation's ability to "'speak with one voice,'" *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 448-49 (1979), is clear.

Both basic limitations on state power help to prevent state interference in foreign affairs and foreign commerce. It becomes especially important to respect those limitations in an international business environment characterized by complex business affiliations that often cross state and national boundaries. Through HVIRA, California seeks to regulate "insurance transactions involving ... German affiliates that took place years ago in Germany, among German residents, under German law, relating to persons, property, and events in Germany." *Gerling Global Reins. Corp.* v. *Gallagher*, 267 F.3d 1228, 1238 (11th Cir. 2001). Such an exercise of authority violates due process, offends the dormant Commerce Clause, and ultimately threatens federal control over foreign affairs and foreign commerce. Of perhaps more importance to *amici*, it directly threatens the free flow of international commerce, and the commonplace corporate relationships on which that flow depends. These practical effects of HVIRA—on which *amici* wish to focus the Court's attention—highlight its constitutionally infirm extraterritorial reach.

HVIRA requires insurance companies operating in the state to file detailed reports regarding policies sold to persons in Europe between 1920 and 1945. Cal. Ins. Code § 13804(a). The Act's reporting requirement extends to companies that never issued policies in Europe during this period, but are only "related" to those that actually issued policies. The

statutory definition of a "related company" is stunningly broad, encompassing "any parent, subsidiary, reinsurer, successor in interest, managing general agent, or affiliate company of the insurer" that is part of the same corporate structure. *Id.* § 13802(b). The reporting requirements thus apply to insurance companies operating in California whether or not they exercise any control over the foreign partners at issue.

If HVIRA is upheld, those companies unable to comply with HVIRA's stringent requirements face suspension of their licenses to do business in California. This severe sanction means immediate loss of revenue, as well as injury to a company's reputation, resulting in loss of market share. It also threatens considerable disruption to California policy-holders, who may suddenly find themselves without valid insurance coverage.

The Ninth Circuit suggests that, if an insurance company is unable to obtain the required information from its foreign partners, it still can avoid sanctions if it chooses to "disaffiliate and thus shed any reporting requirement," *Gerling II*, 296 F.3d at 840. But in today's global marketplace, disaffiliation is not even remotely a viable option. Companies depend on complex, far-flung networks of corporate affiliations to remain competitive in the global marketplace. An insurance company that disaffiliates from its European partners likely faces the same consequences as a company that loses its license in California—loss of revenue, damage to its reputation, and a decrease in market share. An insurance company should not be forced to choose between losing its license in California and losing its affiliates in Europe.

HVIRA creates equally serious difficulties for foreign insurers. California's act requires foreign insurance companies to compile the same massive reports even if the company's only connection to California is through an affiliate or subsidiary. Put another way, it requires action by

foreign insurance companies, over whom California has no jurisdiction, in connection with business transacted outside California as many as 80 years ago with persons having no nexus to California. In addition, HVIRA ignores privacy laws that bind these foreign insurers in their own countries. It thereby forces these foreign companies to choose between violating their own domestic privacy laws or sacrificing an affiliate's business in California.

Enforcement of HVIRA would not only disrupt the affairs of individual companies. Foreign commerce generally would also be adversely affected in a number of ways.

Most directly, HVIRA's enforcement would impose serious economic consequences on the insurance industry, the effects of which would be felt well beyond California's borders. The widespread suspension of certificates that HVIRA promises would generate uncertainty and confusion among policy-holders, many of whom would be left scrambling for new coverage. The consequences of suspending the certificates would not be limited to California. The disruption of insurance coverage in the state would radiate outward, as businesses and individuals in other states and countries react. Insurance companies suffering losses in one state might be forced to increase premiums elsewhere. A California import-export company insured by an affected insurance company, for example, might be forced to restrict its operations, affecting suppliers and customers in other states and countries. Furthermore, due to the accelerating pace of mergers and consolidations in the financial services industry, the disruption will extend even farther than it would have a few years ago.

These consequences are exacerbated by the proliferation of similar statutes. If HVIRA's extraterritorial reach is not reined in, it is likely that other states will continue to follow suit—potentially multiplying HVIRA's impact on foreign

commerce tens of times over.[19] And if the HVIRA model stands, states may choose to adapt it to any number of other politically popular issues that tempt them to engage in regulation beyond their borders.

More broadly, HVIRA threatens to destabilize the international business partnerships that have become a key mechanism for modern foreign commerce. HVIRA uses U.S. affiliates of foreign companies as a pressure point for regulating conduct far beyond its jurisdictional authority. That approach is impermissible under both the Commerce Clause and the Due Process Clause of the Constitution, and it is particularly troublesome in a globalizing economy.

By seeking to regulate matters outside the state, HVIRA injects uncertainty into existing relationships between foreign and U.S. companies. State laws that try to control commerce overseas through regulation of local affiliates jeopardize the ability of U.S. companies to form critical international alliances, since potential foreign partners will legitimately fear being subjected to heavy reporting requirements and regulatory scrutiny by U.S. states in which they do no business. For foreign companies, laws like HVIRA present the very real possibility that their U.S. affiliates will become unwilling conduits for intrusive state regulations. Foreign companies considering joint ventures with or acquisitions of U.S. companies may reconsider if individual U.S. states are free to reach across their borders—indeed across national borders—and regulate the affairs of foreign companies through their U.S. partners.

State foreign policy regulations can also have the effect of undermining U.S. competitiveness as a result of the desire of

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[19] Other states have already passed statutes that mirror HVIRA. Md. Code Ann., Ins. §§ 28-101 to 28-110; Minn. Stat. § 60A.053; N.Y. Ins. Law §§ 2701-2711; Tex. Ins. Code Ann. § 21.74; Wash. Rev. Code § 48.104.010. As noted, Florida's near-identical statute, Fla. Stat. ch. 626.9543, was struck down in *Gallagher*, 267 F.3d at 1240.

individual states to regulate corporate conduct abroad. There is a danger that foreign countries will retaliate against U.S. companies generally for the actions of a few individual states. This Court has recognized the danger of foreign countries retaliating against "the Nation as a whole" for the actions of individual U.S. states. *Japan Line*, 441 U.S. at 450. This risk of retaliation is borne by companies and individuals throughout the United States, most of which lack access to the local California political process that initiated the dispute and thus lack the political means to ameliorate the conflict. Out-of-state concerns and complaints typically fall on deaf ears. California political actors have no incentive to pay heed to those who are not constituents. Yet California's deafness to national and international concerns puts companies nationwide at risk of retaliation.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully ask this Court to reverse the decisions of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Nos. 02-722, 02-733

IN THE

Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, *et al.*,
Petitioners,

v.

JOHN GARAMENDI, IN HIS CAPACITY AS COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,
Respondent.

GERLING GLOBAL REINSURANCE CORP., *et al.*,
Petitioners,

v.

JOHN GARAMENDI, IN HIS CAPACITY AS COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF GOVERNMENT OF SWITZERLAND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF GOVERNMENT OF SWITZERLAND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37 of the Rules of this Court, the Government of Switzerland respectfully submits this brief as

amicus curiae to urge reversal of the judgment below.[1] Petitioners and respondent consented to the filing of this brief.

INTEREST OF THE AMICUS CURIAE

Arising simultaneously with major reevaluations by many countries of the conduct of their governments, industries, and general populations during the World War II era, the issue of payments by corporations to resolve outstanding World War II era claims has become prominent in recent years. The role of civil lawsuits in the United States courts in this process has itself been highly controversial.

Switzerland was the first country to deal in a comprehensive manner with the issue of corporate payments to resolve World War II era claims. On August 9, 2000, the U.S. District Court for the Eastern District of New York formally approved a settlement agreement among Swiss companies, class action plaintiffs, and the World Jewish Restitution Organization. The settlement agreement, which includes payment to the plaintiffs of $1.25 billion, by its terms provides for complete legal and material resolution of Holocaust-related issues for all of Switzerland, with the exception of three Swiss insurance companies. Meanwhile, the Government of Switzerland has endorsed the work of the International Commission on Holocaust Era Insurance Claims, an international organization formed to address unpaid insurance claims.

The Government of Switzerland has grave concerns that the decision of the U.S. Court of Appeals for the Ninth Circuit, by encouraging the State of California and other States to pursue their own unilateral agendas, may undermine the extensive efforts that have been made by Swiss industry,

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[1] Counsel for the Government of Switzerland prepared this brief in its entirety, and no person or entity other than the Government of Switzerland and its counsel made a monetary contribution to its preparation or submission.

major Jewish organizations, and the Swiss and United States governments to achieve a comprehensive resolution of a difficult and complex international issue. In addition, the Government of Switzerland has a vital interest in the preservation of the integrity of the laws and legal system of Switzerland, and believes that the decision of the Ninth Circuit must be reversed to prevent the California statute from requiring the production of confidential information from Switzerland in a manner inconsistent with Swiss law and sovereignty.

Accordingly, the Government of Switzerland submits this brief to explain its views on why the California statute, if applied, would interfere with Swiss-United States relations.

SUMMARY OF ARGUMENT

The Holocaust Victim Insurance Relief Act of 1999 ("HVIRA"), Cal. Ins. Code §§13900-13807, is a California statute that would impose onerous reporting burdens on foreign companies, including Swiss companies, relating to records of World War II era transactions that took place over fifty years ago in foreign countries with persons who were not United States citizens or present in the United States at the time of those transactions. The purpose of the statute is to facilitate the initiation of civil lawsuits in California against foreign companies.

On February 7, 2001, the U.S. Court of Appeals for the Ninth Circuit reversed the holdings of the U.S. District Court for the Eastern District of California and held that the HVIRA is consistent with the Foreign Commerce Clause and does not infringe upon the foreign affairs power of the Executive Branch. On remand, the district court issued a permanent injunction enjoining enforcement of the HRIVA on the grounds that mandating license suspension for non-performance of impossible tasks deprived the petitioners of a protected property interest without due process of law. On July 15, 2002, the Ninth Circuit again reversed the district court, distinguished the decision of the U.S. Court of Appeals

for the Eleventh Circuit with respect to a similar statute in *Gerling Global Reins. Corp. v. Gallagher*, and upheld the HRIVA against the petitioners' constitutional claims.

Contrary to the Ninth Circuit's holdings, the HVIRA, if applied, will have a significant effect on the foreign relations of the United States with Switzerland. The HVIRA is inconsistent with the August 9, 2000 settlement of class action claims against Swiss interests in the United States District Court for the Eastern District of New York, as well as with a joint Swiss-United States undertaking on Holocaust-related claims. In addition, by requiring Swiss companies to provide confidential information from Switzerland, the HVIRA would compel the violation of Swiss sovereignty and Swiss privacy laws. Finally, the Ninth Circuit's decision conflicts with rulings of this Court and the U.S. Courts of Appeals for the First and Eleventh Circuits.

Based on these factors, this Court should reverse the Ninth Circuit's decision and hold that the HRIVA is unconstitutional.

ARGUMENT

A. The HVIRA Is Inconsistent With a Pre-Existing Settlement Agreement Between Swiss Industry, Class Action Plaintiffs, and the World Jewish Restitution Organization That Is Supported by the Swiss and United States Governments

On August 9, 2000, the U.S. District Court for the Eastern District of New York formally approved a settlement agreement among Swiss companies, class action plaintiffs, and the World Jewish Restitution Organization regarding World War II era claims in the case *In re: Holocaust Victims Assets Litigation*, 96 Civ. 4849, 2000 U.S. Dist. Lexis 15644 (E.D.N.Y. Aug. 9, 2000). The settlement agreement, which includes payment to the class action plaintiffs of $1.25 billion, by its terms provides for complete legal and material

resolution of Holocaust-related issues for all of Switzerland, with the express exception of three Swiss insurers.[2]

The Swiss and United States Governments have formed a Joint Economic Commission ("JEC"), comprised of senior representatives of the two governments. In a Joint Statement issued through the JEC on January 29, 2000, the Swiss and United States Governments reaffirmed their determination to maintain open markets and to promote bilateral market access for trade, finance and investment, including the insurance industry. With regard to Holocaust-related matters, the JEC commended Switzerland's ongoing efforts and specifically:

> welcom[ed] the settlement that was achieved in In Re Holocaust Victim Assets Litigation . . . which . . . when approved will be recognized by all interested parties as complete legal and material resolution of Holocaust related issues for all of the Swiss economy . . . and for the Swiss government.

ER 2384-85.[3]

The application of the HVIRA to Swiss companies (other than the three specifically exempted from the settlement) would interfere with the settlement agreement's release of the Swiss economy and would be inconsistent with the policies of the Swiss and United States Governments supporting that settlement.

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[2] The three exempted insurers are Basler Lebensversicherungs-Gesellschaft, Zurich Lebensversicherungs-Gesellschaft, and Winterthur Lebensversicherungs-Gesellschaft.

[3] Citations to "ER" refer to the Excerpts of Record in the preliminary injunction appeal to the Ninth Circuit.

B. The HVIRA Conflicts With a Joint Endorsement of the International Commission on Holocaust Era Insurance Claims by the Swiss and United States Governments

The JEC's January 29, 2000 Joint Statement specifically addressed the issue of insurance claims by stating that the two governments:

> further welcom[ed] the ongoing constructive discussions in the framework of the International Commission on Holocaust Era Insurance Claims ... on unpaid policies of European insurance companies dating from [the World War II] period, as an appropriate forum for resolving Holocaust related issues for those three Swiss insurance companies not [released] by the Swiss settlement.

ER 2385.

In the Action Plan annexed to the Joint Statement, the United States Government pledged to "call on State insurance Commissioners and State legislative bodies to refrain from taking unwarranted investigative initiatives or from threatening or actually using sanctions against Swiss insurers." ER 2390.

The JEC Joint Statement and the associated United States Government assurances are of great importance to Switzerland and Swiss industry, and accordingly the Government of Switzerland has expressed concern to the United States Government and the United States courts about the HVIRA on a number of occasions. For example, on April 6, 2000, the Government of Switzerland presented to the United States Government an Aide-Mémoire expressing its opinion that state laws such as the HVIRA would violate Swiss sovereignty and international law. App., *infra*, A-1. On June 2, 2000, the Government of Switzerland sent its views on the HVIRA directly to the district court. ER 2375. On August 9, 2000, the Government of Switzerland presented

a diplomatic note to the United States Government regarding this case, in which it requested that the United States Government submit a brief as *amicus curiae* to the Ninth Circuit re-affirming the view that State legislative bodies should refrain from threatening or imposing sanctions against Swiss insurers. App., *infra*, B-1. The Government of Switzerland later submitted a brief as *amicus curiae* to the Ninth Circuit in support of the Petitioners' request for a rehearing *en banc* before the case was remanded to the district court, and submitted a brief as *amicus curiae* supporting the granting of the petition for certiorari in this appeal.

The Government of Switzerland is particularly concerned that actions taken by the State of California under the HVIRA will jeopardize the work of the International Commission on Holocaust Era Insurance Claims, which was formed to address issues of unpaid World War II era insurance claims. In the view of the Government of Switzerland, that commission is the most effective and expeditious vehicle for resolving unreceived and as yet unsettled insurance claims from the World War II era that are not already covered by the settlement agreement discussed above.

Finally, the Government of Switzerland notes that the JEC is a continuing initiative, and that since the January 29, 2000 Joint Statement the JEC has engaged in a number of discussions and joint projects on other topics. For example, the JEC has promoted bilateral cooperative efforts on industry biosafety measures to safeguard laboratories and pathogens from terrorist access, and has spearheaded efforts to combat international economic crime, including the blocking of terrorist financing and the freezing of terrorist assets. The JEC also provides a forum for the discussion of bilateral trade issues. *See* Agenda for January 25, 2003 JEC Plenary Session, App., *infra*, C-1. To the extent that the United States Government is unable to implement the joint recommendations of the JEC – such as with respect to the issues involved with the HVIRA – the Government of

Switzerland is concerned that the credibility and effectiveness of the JEC may be undermined.

C. The HVIRA Would Require Swiss Companies to Violate Swiss Law

California lacks jurisdiction, as that concept is commonly understood in international law, to regulate foreign companies with respect to transactions that took place in foreign countries with persons who were not United States citizens or present in the United States at the time of those transactions.[4] In the absence of a genuine connection between the issues involved and United States jurisdiction, the enforcement of the HVIRA against insurance companies headquartered in Switzerland would violate international law and Swiss sovereignty. Furthermore, such enforcement would result in conflicting requirements imposed on the companies concerned to the extent that compliance with the California legislation would require a violation of the applicable Swiss privacy laws, resulting in interference with the Swiss legal system.[5]

In the view of the Government of Switzerland, the HVIRA bears no genuine relation to the regulation of the provision of insurance services in California, but rather is designed to demonstrate that the state of California disapproves of the international cooperative actions taken to facilitate resolution of Holocaust era claims. Especially under

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[4] *See, e.g.*, Restatement (Third) of the Foreign Relations Law of the United States (1987) § 403 ("[A] state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.").

[5] For example, Article 273 of the Swiss Penal Code prohibits persons in Switzerland from releasing to foreign governments confidential business information relating to third parties, unless certain procedures are followed within Switzerland that ensure that the rights of third parties are appropriately protected. The California statute does not allow for the application of this Swiss law.

these circumstances, the HVIRA's extraterritorial reach cannot be justified.

D. The Ninth Circuit's Decision Conflicts with Holdings of this Court and the U.S. Courts of Appeals for the First and Eleventh Circuits

The Ninth Circuit's decision is inconsistent with holdings of this Court and other Courts of Appeals on the Commerce Clause, the foreign affairs powers of the Executive Branch and the requirements of due process.

In its initial ruling, the Ninth Circuit made the following comment on the January 29, 2000 Joint Statement of the JEC:

> But even if we were to assume that a conflict exists between the Holocaust Act and the Swiss-US Joint Statement with regard to seeking information from Swiss insurers, Congress' action controls in this instance. . . . [A]s noted, the Swiss-US Joint Statement is not a treaty, and preemption is not an issue here. Plaintiffs' argument that a "policy interest" found in an executive branch "Joint Statement" creating an Economic Commission trumps Congress' express constitutional authority to regulate foreign commerce is incorrect.

Petition for Certiorari App. 54a-55a (footnotes omitted).

There is no dispute that Congress has the authority to regulate foreign commerce, but Congress has not enacted any statute that preempts or otherwise restricts the ability of the Executive Branch to engage in negotiations with Switzerland or other foreign countries regarding resolution of Holocaust-related claims. The interpretation by the Ninth Circuit appears to suggest that, absent the implementation of a formal treaty, the Executive Branch lacks any foreign affairs power worthy of respect by the courts. Such a restrictive interpretation of the foreign affairs authority of the Executive Branch, if allowed to stand, would have significant

consequences for the ability of the federal government to interact with foreign nations.

Although the Ninth Circuit recognized that the Supreme Court's decision in *Zschernig v. Miller*, 389 U.S. 429 (1968), held that a state may not intrude on the federal government's foreign affairs power, it declined to apply that decision. The Ninth Circuit's ruling also is inconsistent with the recent holding of the U.S. Court of Appeals for the First Circuit on the foreign affairs power in *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 49-59 (1st Cir. 1999), *aff'd on other grounds sub nom., Crosby v. National Foreign Trade Council*, 120 S. Ct. 2228 (2000).

Finally, the Ninth Circuit's ruling conflicts with the Eleventh Circuit's decision in *Gerling Global Reins. Corp. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001), which invalidated Florida's Holocaust Victims Insurance Act. Like the HRIVA, the Florida statute imposed reporting requirements on the Florida affiliates of European insurers that issued policies during the Holocaust to facilitate civil lawsuits for World War II era claims. The Eleventh Circuit held that the Florida statute violated due process limits on Florida's legislative jurisdiction. Notwithstanding the Ninth Circuit's attempt to distinguish *Gallagher*, the facts and issues presented in these two cases were virtually identical. The Government of Switzerland believes that the reasoning of the Eleventh Circuit in *Gallagher* is persuasive and is equally applicable to the HVIRA.

CONCLUSION

For the foregoing reasons, the Court should reverse the Ninth Circuit's decision and hold that the HRIVA is unconstitutional.

Respectfully submitted,

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APPENDICES

APPENDIX A

AIDE MÉMOIRE

Several US States - inter alia Florida, California and Washington State - have enacted special legislation in the context of unrecovered insurance policies dating from the World War II period. These pieces of legislation require insurance companies doing business in the States concerned to provide comprehensive information on individual insurance policies under the threat of severe penalties, including the suspension of the companies' business license. Considering the clearly extraterritorial scope of these laws, their enforcement against insurance companies headquartered in Switzerland can be considered a violation of international law and Swiss sovereignty, which is liable to result in conflicting requirements imposed on the companies concerned to the extent that full compliance with the special State legislation would most likely imply a violation of applicable Swiss penal and data protection laws.

The Swiss Government is concerned about this situation and the renewed threat of sanctions and administrative harassment in a number of US States against European insurance companies, including Swiss companies. It considers that such threats or the actual use of sanctions, on the basis of potentially discriminatory and otherwise legally contestable State legislations, is in contradiction with the spirit of cooperation that the Swiss and US governments have reaffirmed at Davos and could strain the bilateral relations between Switzerland and the United States. Moreover, such threats or sanctions are completely unjustified as well as counter-productive in the light of the Swiss Settlement Agreement as well as the cooperative attitude of the Swiss insurance companies concerned.

The Swiss Government holds the view that this issue needs to be promptly addressed by the U.S. Government.

APPENDIX B

EMBASSY OF SWITZERLAND

The Embassy of Switzerland presents its compliments to the United States Department of State and has the honor of requesting its assistance in relation to the case of Winterthur International America Insurance Company, et al. v. Chuck Quackenbush, Insurance Commissioner for the State of California (Case No. CIV. S-00-779 [JFM]), in which the California Holocaust Victim Insurance Relief Act (the "California HVIRA") is being challenged by several insurers that do business in the State of California.

The California HVIRA purports to impose obligations on Swiss and other foreign companies "related" to U.S. companies, notwithstanding the fact that those companies are not engaged in business in California or indeed in the United States. It is the understanding of the Government of Switzerland that if the related Swiss companies do not comply with the directives of the California Insurance Commissioner under the HVIRA, their U.S. affiliated companies could be sanctioned and lose their licenses to conduct business in California.

Because of the extraterritorial scope of this legislation and the absence of a genuine connection between the issues involved and U.S. jurisdiction, its enforcement against insurance companies headquartered in Switzerland would violate international law and Swiss sovereignty. Furthermore, such enforcement would result in the imposition of conflicting requirements on the companies concerned to the extent that compliance with the California legislation would require a violation of the applicable Swiss penal and data protection

laws. The Government of Switzerland is concerned about potential attempts to interfere with the Swiss legal system.

The Government of Switzerland is also concerned that enforcement of this legislation would interfere with the Class Action Settlement Agreement reached in In Re Holocaust Victim Assets Litigation ("Swiss Settlement"). The Swiss Settlement by its terms provides for complete legal and material resolution of Holocaust-related issues for all of Switzerland, with the exception of three Swiss insurers which are involved in separate lawsuits. The California HVIRA conflicts with the Swiss Settlement's release of all other Swiss insurance companies and therefore is inconsistent with United States and Swiss government policies supporting the Settlement.

In addition, the issues referred to in the California HVIRA have been specifically addressed in the framework of the Joint Economic Commission ("JEC") recently established by our governments. A Joint Statement issued on the occasion of the inaugural meeting of the JEC specifically "welcom[ed] the settlement that was achieved in In Re Holocaust Victim Assets Litigation . . . which . . . , when approved will be recognized by all interested parties as complete legal and material resolution of Holocaust related issues for all of the Swiss economy [including the banking, insurance and manufacturing sectors] . . . and for the Swiss government." The JEC "further welcom[ed] the ongoing constructive discussions in the framework of the International Commission on Holocaust Era Insurance Claims ("Eagleburger Commission") on unpaid policies of European insurance companies dating from [the World War II] period, as an appropriate forum for resolving Holocaust related issues for those three Swiss insurance companies not [released] by the Swiss settlement." The JEC stated that it would "address issues related to potentially disruptive and counterproductive effects of investigative initiatives or the threat or actual use of sanctions on a sub-federal level against insurers, including

those that are part of the Swiss settlement or that are participants in the Eagleburger Commission."

In the Action Plan annexed to the Joint Statement, the U.S. Government pledged to "call on the U.S. State insurance Commissioners and State legislative bodies to refrain from taking unwarranted investigative initiatives or from threatening or actually using sanctions against Swiss insurers."

The Government of Switzerland has on several recent occasions expressed concern to the U.S. Government about State actions related to Holocaust insurance issues. Most recently, on April 6, 2000, the Government of Switzerland presented to the U.S. Government an Aide-Mémoire requesting prompt attention to this issue and expressing concern that such laws as the California HVIRA violate Swiss sovereignty and international law and may cause involved Swiss insurance companies to violate Swiss laws. The Government of Switzerland further objected to laws such as the California HVIRA on the grounds that they are potentially discriminatory against Swiss financial industries and a potential cause of strain on relations between the two countries. The Aide-Mémoire pointed out that laws such as the California HVIRA are counter-productive in light of the efforts and cooperative attitude of Swiss insurance companies in this matter.

Consistent with our understanding of the Department of State's policy of encouraging foreign governments to communicate directly with the United States Courts, the Government of Switzerland attempted to submit its views on this matter in a letter dated June 2, 2000 to the federal district court in which the case is being heard. The Embassy of Switzerland has learned, however, that on July 31, 2000, the court stated that it would not accept submission of the letter for procedural reasons. The Embassy therefore requests that the Department of State forward a copy of this note to the court on its behalf.

The Government of Switzerland is informed that a preliminary decision of the district court imposing a preliminary injunction against enforcement of the California HVIRA is currently pending before the Court of Appeals for the Ninth Circuit. The Government of Switzerland hereby requests that the United States Government make a submssion to the Court of Appeals, re-affirming the position of the Joint Economic Commission that the International Commission on Holocaust Era Insurance Claims is the appropriate forum for resolving remaining pertinent issues and that State authorities should refrain from taking unwarranted investigative initiatives or from threatening or imposing sanctions against Swiss insurers that would be liable to cause serious, irreparable damage to the companies concerned.

The Embassy of Switzerland avails itself of this opportunity to thank the United States Department of State for its cooperation and to renew the assurances of its highest consideration.

Washington, D.C., August 9, 2000

United States Department of State
Washington, D.C.

JEC PLENARY SESSION
SATURDAY – JANUARY 25, 2003 - DAVOS

A. During Secretary Thompson's Participation

1. Bioterrorism Cooperation: Completing U.S.-Swiss industry initiative for promoting worldwide industry "biosafety" measures to safeguard labs and pathogens from terrorist access;

(ENCOURAGING CONTINUED ENGAGEMENT OF U.S. AND SWISS PHARMACEUTICAL INDUSTRIES TO COMPLETE A BIOSAFETY CODE TO FIGHT BIOTERRORIST ACCESS TO LABS)

2. FDA-Swissmedic Regulatory Cooperation: Cooperation between U.S. FDA and Swissmedic in Steps Toward a Mutual Recognition Agreement for Pharmaceutical and Medical Device Products:

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(REPORT ON U.S.-SWISS COOPERATION TO DATE / WHAT'S NEXT IN FIGHT AGAINST TERRORIST FINANCING? POSSIBLE JOINT EFFORTS TOWARDS CAPACITY BUILDING FOR

BETTER FINANCIAL CENTER DUE DILIGENCE; SUPPORT FOR FATF PROCESS)

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(UPDATE ON CURRENT PROGRESS THROUGH EAGLEBURGER COMMISSION)

2. WTO/Trade Issues: Cooperation at Doha; including TRIPS issue for pharmaceuticals; steel
(REPORT ON OUR DOHA PRIORITIES AND FOLLOW UP)

3. Trade in Livestock Products: Resolving Disputes over U.S. beef entry to Swiss market and Swiss dried beef access to U.S.
(REPORT ON CURRENT DIALOGUE (ROAD MAP) TOWARDS RESOLVING IMPORT OF DRIED BEEF TO U.S. AND IMPORT OF U.S. BEEF TO SWITZERLAND)

4. Thomas Bill: Potential impact on foreign direct investment

5. Telecommunication: Provisioning of Leased Lines and Unbundling the Last Mile

(SWISS UPDATES ON TELECOM POLICY REFORMS)

F. Export Controls

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(EXCHANGE OF VIEWS ON ISSUES THAT NEED TO BE ADDRESSED TO IMPROVE COORDINATION OF REGIMES CONTROLLING EXPORTS OF ARMS AND DUAL-USE TECHNOLOGIES)

G. Science and Technology Cooperation

1. Science and Technology Framework Agreement (STFA): Promoting synergy between research and industry;

(MERITS OF A POSSIBLE U.S.-SWISS S&T FRAMEWORK AGREEMENT)

No. 02-722

MAR 28 2003
CLERK

IN THE

Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION,
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JOHN GARAMENDI, IN HIS CAPACITY AS
COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF REP. HENRY A. WAXMAN AND 51 OTHER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether California's statutory condition on the sale of insurance within its borders, requiring disclosure of certain information pertinent to an insurer's fitness to do business, is constitutional.

2. Whether the Judiciary should invalidate the California statute using a judicially created "dormant foreign relations preemption" doctrine even though the political branches are fully empowered to preempt the statute under Art. VI, § 2, a course they have not chosen.

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INTEREST OF *AMICI CURIAE*

Amici curiae are members of the United States House of Representatives and the United States Senate as set forth in the Appendix. *Amici* are concerned about the federalism and separation-of-powers implications of the position taken by the Executive Branch in this case.[1]

That position, if adopted by this Court, would impinge on Congress's power to regulate commerce by casting doubt on its ability to share regulatory authority with the States. Here, Congress has ceded the field of insurance regulation to the States. California has imposed a disclosure condition on future insurance operations in California that is rational and of the sort that obviously would be constitutional if imposed directly by Congress. A holding that the California statute is nonetheless unconstitutional would impair the ability of Congress to defer to the States in areas that it deems best suited for state regulation, thereby diminishing the aims of cooperative federalism.

The Executive Branch's position would also aggrandize the power of the President in a field — regulation of commerce — that under the Constitution is textually committed to Congress. The Judicial Branch should not weaken Congress's commerce powers by applying the so-called "dormant foreign relations preemption" doctrine to preempt a state statute regulating commerce in a field in which Congress has ceded primary authority to the States. It is the responsibility of the political branches of the federal government acting together (though legislation subject to the veto power or a treaty approved by the President and Senate) to override a state regulation of commerce if warranted by foreign relations concerns. There is no warrant, or need, for intervention by the Judicial Branch.

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[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk. Counsel for a party did not author this brief in whole or in part. No person or entity other than counsel for *amici curiae* made a monetary contribution to the preparation or submission of this brief.

ARGUMENT

I. HVIRA IS CONSTITUTIONAL BECAUSE IT MERELY CONDITIONS THE SALE OF INSURANCE IN CALIFORNIA ON CERTAIN DISCLOSURES RATIONALLY RELATED TO INSURERS' FITNESS, A REGULATION OF COMMERCE WELL WITHIN THE AUTHORITY CEDED BY CONGRESS

For well over a century, the States have had primary authority over the regulation of insurance sold within their borders, initially pursuant to decisions of this Court, and then pursuant to federal legislation. *E.g.*, *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1868); McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015; *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 413-18, 421-23, 429-32 (1946). The California statute at issue in this case, which merely imposes a condition on selling insurance within the state, is the type of regulation of commerce whose constitutionality has never been doubted.

The suggestion that the California statute involves an unconstitutional effort to regulate foreign relations or regulate extraterritorially depends for its plausibility on an imprecise characterization of the statute. In its *amicus* brief, the Executive Branch characterizes the statute as "requir[ing] each insurance company doing business in the State to disclose for publication detailed information concerning policies issued by the company or its affiliates in Europe decades ago." Brief for the United States as *Amicus Curiae* Supporting Petitioners ("U.S. Br.") at 5 (citing Holocaust Victim Insurance Relief Act of 1999 (HVIRA), Cal. Ins. Code §§ 13800 et seq.). However, HVIRA does not mandate disclosure of any information. It merely imposes as *a condition of doing business in California in the future* that an insurance company disclose certain information. (HVIRA is the only statute whose constitutionality is before the Court. Pet. App. 6a-7a, 10a-11a, 16a-17a, 38a, 43a.)

Nothing in HVIRA imposes a penalty on insurers that do not disclose the information. Nothing in HVIRA authorizes injunctive relief against insurers to compel disclosure. HVIRA merely imposes a condition on the sale of insurance in California. The sole consequence of an insurer's failure to disclose this information is that, if disclosure does not occur within 210 days of the statute's effective date, the insurance company's authority to sell insurance in California is suspended until the required disclosure occurs. Cal. Ins. Code § 13806. *See also* Brief for the Petitioners ("Pet. Br.") at 14-15 (citing administrative record indicating that insurance companies may simply cease doing business in the state if they do not wish to make the disclosures).

There is a vital distinction between a statute that compels disclosure and a statute that merely conditions continued insurance operations on disclosure. In *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648 (1981), this Court confirmed that the States have broad powers to impose conditions on the ability of insurers to do business in a state. In upholding a special California tax on out-of-state insurers designed to pressure other States and foreign countries to lower taxes on California insurers, *see id.* at 649-50 & n.1, this Court stated that a State may "exclude foreign corporations from doing business within its boundaries" on terms not "imposed on domestic corporations" as long as "the discrimination between foreign and domestic corporations bears a rational relation to a legitimate state purpose." *Id.* at 668; *see also id.* at 657-68 (surveying long line of precedent). Of course, the statute at issue in this case involves no discrimination; HVIRA's disclosure provisions apply equally to both California and non-California insurance companies that sell insurance in California.

Once HVIRA is accurately understood as merely imposing a disclosure condition on future insurance operations in California, it is easily upheld as constitutional. Solid evidence has emerged of questionable actions by insurers that sold insurance policies to

victims of the Holocaust. For decades these insurers have concealed information necessary to evaluate whether or not they took advantage of the victims of the Holocaust and their heirs. Although these insurers have a vast array of Holocaust-era policy records, they have refused to make available to the public any meaningful portion of the records. Many Holocaust victims and their heirs lack the most basic information needed to process their claims (because their own records were destroyed as a result of the Holocaust), and many insurers have wrongly denied Holocaust-era insurance claims.[2] A significant number of these insurance companies currently operate in the United States, either directly or through affiliates. Full disclosure of such information is something that rational regulators and rational consumers have a legitimate interest in securing.

In the exercise both of its own power and the additional authority ceded by Congress under the McCarran-Ferguson Act, it was obviously permissible for the California legislature to conclude as it did in HVIRA

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[2] *Amici* and other Members of Congress are familiar with this area, as Congress has enacted pertinent legislation, *see* U.S. Holocaust Commission Act of 1998, Public Law 105-186, 112 Stat. 611, as amended Pub. L. 106-155, § 2, 113 Stat. 1740 (1999) (codified at 22 U.S.C. § 1621 note), and has held hearings. *E.g.*, *H.R. 2693, The Holocaust Victims Insurance Relief Act of 2001: Hearing Before the Subcomm. on Government Efficiency, Financial Management and Intergovernmental Relations of the House Comm. on Government Reform*, 107th Cong. (2002); *The Status of Insurance Restitution for Holocaust Victims and Their Heirs: Hearing Before the House Comm. on Government Reform*, 107th Cong. (2001); *Restitution of Holocaust Assets: Hearing Before the House Comm. on Banking and Financial Services*, 106th Cong. (2000); *Heirless Property Issues of the Holocaust: Hearing Before the House Comm. on International Relations*, 105th Cong. (1998); *The Restitution of Art Objects Seized by the Nazis From Holocaust Victims and Insurance Claims of Certain Holocaust Victims and Their Heirs: Hearing Before the House Comm. on Banking and Financial Services*, 105th Cong. (1998). Of the Members of Congress submitting this *amicus* brief, 31 either co-sponsored the Holocaust Commission Act of 1998, or serve on (or have served on) a committee or subcommittee that has held a hearing in this area, or both.

that an insurer, to continue selling insurance in California, must disclose its records (and those of any affiliates) with regard to Holocaust-era insurance policies. As far back as *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868), this Court held that a State may require foreign insurance companies, as a condition of doing business, "to give publicity to their transactions" and "submit their affairs to proper examination." *Id.* at 182.

Although HVIRA is, on its face, a regulation of the insurance business in California of the sort that has long been recognized as constitutional, the opponents of the statute argue that one or more motives assertedly underlying the enactment invalidate it. The Executive Branch complains that HVIRA was enacted, in part, to assist Holocaust victims and their heirs in pursuing claims for payment on insurance policies, by way of arbitration or litigation. U.S. Br. at 14 (citing Cal. Ins. Code § 13801). Petitioners cite aspects of the legislative history of HVIRA suggesting that the California legislature was motivated partly by a desire to assist Holocaust victims and their heirs in uncovering information pertinent to claims they may have, not just a desire to uncover information pertinent to an insurer's fitness to do business in the future. Pet. Br. at 9-11.

Although *amici* see nothing wrong with the motives attributed to the California legislature, motives are not at issue. This Court long ago held that inquiries into legislative motive are not relevant to the constitutionality of a regulation of commerce. In *United States v. Darby*, 312 U.S. 100 (1941), the Court confronted the argument that Congress lacked the authority to prohibit interstate shipment of lumber manufactured under conditions not meeting the minimum wage and maximum hour standards of the Fair Labor Standards Act. At a time when the intrastate manufacture of goods was still viewed as "not of itself interstate commerce," the argument was made that the Act was only "nominally" a regulation of commerce, as its "motive or purpose [was] regulation of wages and hours" for manufacturing work done intrastate, "under the guise of a regulation of

interstate commerce . . . ." *Id.* at 113-14.

This Court agreed that the motive and purpose of the Act was to use Congress's regulatory power over interstate commerce to do indirectly what Congress could not do directly — alter the conditions of intrastate manufacturing work so as "to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions." *Id.* at 115. Nonetheless, this Court held that "[t]he motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control." *Id.* It emphasized that "the power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution." *Id.* at 116. Motive and purpose are likewise irrelevant in determining the constitutionality of HVIRA.[3]

Where, as here, Congress has ceded to the States plenary authority over a given area of commerce, there is no reason to impose a test for the constitutionality of a state statute regulating commerce that is any stricter than the test applied to a federal statute regulating commerce. Congress should be free to authorize States to engage in any regulation that "Congress is not constitutionally prohibited from directly adopting" through its own enactment. William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 Stan. L.

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[3] On its face, HVIRA regulates commerce within California by conditioning future business operations on the disclosure of certain information about an insurer and its affiliates. That information has a rational connection to the fitness of an insurer to do business within a state (there is no claim that requiring the information is arbitrary, in violation of substantive due process). Such disclosure permits both regulators and consumers to better analyze what future role the insurer should have in the California insurance market.

Rev. 387, 388 (1983). The issue should be: "Does Congress have the power to enact the contested legislation itself?" *Id.*; *see also id.* at 390-93, 398-401, 406, 411-12; William Cohen, *Federalism in Equality Clothing: A Comment on* Metropolitan Life Insurance Company v. Ward, 38 Stan. L. Rev. 1, 9-20 (1985). *Cf. Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 901 (1985) (O'Connor, J., joined by Brennan, Marshall, and Rehnquist, J.J., dissenting) (citing 1983 Cohen article). In particular, petitioners' argument that a licensing statute like HVIRA involves prohibited extraterritorial regulation, *e.g.*, U.S. Br. at 20-28; Pet. Br. at 43-50, hardly tenable when lodged against a state statute, could not seriously be asserted against an Act of Congress. *E.g.*, *Cohen*, 35 Stan. L. Rev. at 411-12.

II. HVIRA, AS A STATUTE ENACTED IN A FIELD IN WHICH THE STATES HAVE BEEN CEDED PRIMARY AUTHORITY, MAY BE PREEMPTED ON FOREIGN RELATIONS GROUNDS ONLY BY AN ACTION OF THE POLITICAL BRANCHES HAVING THE FORCE OF LAW

Of equal concern to *amici* is the argument advanced by the Executive Branch and petitioners that even if HVIRA does not violate any specific provision of the Constitution, this Court should hold it preempted under the so-called "dormant foreign relations preemption" doctrine. This Court has relied on that doctrine to invalidate a state statute just once, more than thirty years ago, in *Zschernig v. Miller*, 389 U.S. 429 (1969). Justice Douglas's opinion for the Court in *Zschernig* set forth a radically new mode of preemption analysis that was not even necessary to the result. *See id.* at 443-57 (Harlan, J., concurring in the result). *See generally* Louis Henkin, *Foreign Affairs and the United States Constitution* 162-65 (2d ed. 1996); Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 Notre Dame L. Rev. 341,

356-57 (1999); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815, 864-65 (1997); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1629-31, 1643, 1649, 1660-61, 1691-93 (1997).

Under the interpretation of the highly controversial *Zschernig* doctrine advocated by the Executive Branch and petitioners, judges are to weigh various pieces of evidence about possible disruption of foreign relations to decide whether to preempt a state statute. U.S. Br. at 10-20; Pet. Br. at 19-32. Resort to such a doctrine was perhaps understandable in a context such as *Zschernig*, which involved probate courts' practice during the Cold War of voicing gratuitous, provocative criticisms of Communist nations as an excuse for disinheriting their citizens. *See Zschernig*, 389 U.S. at 433-41. But where, as here, the state action involves a state statute regulating commerce in a field that Congress has ceded to the States, the theory of dormant foreign relations preemption has no proper role. A statute such as HVIRA should be held preempted only when the political branches have taken action having the force of law and sufficient to preempt a state statute under Art. VI, § 2.

That approach is strongly supported by this Court's decision in *Barclays Bank PLC v. Franchise Tax Board of California*, 512 U.S. 298 (1994). In *Barclays Bank*, a phalanx of foreign companies and foreign governments, *see id.* at 300-01 n.†, 320, contended that California's worldwide combined report method of taxing multinational corporations should be held preempted under the foreign dormant commerce clause doctrine. They contended that California's statute undermined the "Federal Government's ability to 'speak with one voice when regulating commercial relations with foreign governments.'" *Id.* at 302-03 (quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979)); *see also id.* at 311, 320-30.

This Court dismissed these concerns as "directed to the wrong forum," explaining that this was not a matter to be decided under a balancing test applied by the Judicial Branch. *Id.* at 328. In particular, this Court rejected the companies' argument that the statute should be deemed preempted because of "a series of Executive Branch actions, statements, and *amicus* filings" critical of the statute. *Id.* at 328. It noted that Congress had tolerated California's method of taxing foreign corporations, *id.* at 327, and emphasized that "[t]he Constitution expressly grants Congress, not the President, the power to 'regulate Commerce with foreign Nations.'" *Id.* at 329 (quoting Art. I, § 8, cl.3).[4]

That reasoning should be dispositive of this case. Here, Congress has not merely tolerated California's regulation of insurance; it has ceded this field of regulation to California and its sister States. Further, in legislation enacted in 1998, see note 2, *supra*, Congress favorably noted the role of state regulators in investigating the handling of Holocaust-era insurance claims. Rather than block such actions or express disapproval, Congress affirmatively instructed federal officials to review the results of the state regulators' investigations. *See* Pet. App. 47a-50a (summarizing congressional directives).

In addition, based on a hearing held in November, 2001, Congress has reason to believe that HVIRA will facilitate the expeditious implementation of the claims resolution procedures addressed in the executive agreements cited by petitioners and the Executive Branch. *See The Status of Insurance Restitution for*

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[4] On the implications of *Barclays Bank* for the continued vitality of *Zschernig*, *see* Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. Colo. L. Rev. 1395, 1426-27 (1999) (noting that "*Barclays Bank* marks a return to a" rule-like, "pre-*Zschernig* approach to state activities that cause foreign relations controversies."); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. Colo. L. Rev. 1223, 1266 (1999) (noting that the reasoning of *Barclays Bank* "could be deployed to reverse" *Zschernig*).

Holocaust Victims and Their Heirs: Hearing Before the House Comm. on Government Reform, 107th Cong. (2001). Indeed, it appears that laws such as HVIRA are necessary for Holocaust victims to take advantage of the dispute resolution procedures addressed in these executive agreements. That hearing revealed that more than 80% of Holocaust-era insurance claims submitted to the International Commission on Holocaust Era Insurance Claims (ICHEIC) cannot be adequately processed because claimants cannot identify the company holding their assets. *Id.* at 70, 180 (ICHEIC Chair Lawrence Eagleburger); *see also id.* at 90, 98 (National Association of Insurance Commissioners). HVIRA will help solve this problem, thereby facilitating the submission to ICHEIC of accurate claims, and their efficient resolution.

As suggested by *Barclays Bank*, 512 U.S. at 329, the proper method by which opponents of HVIRA may secure federal preemption of this state statute is through one of the modes listed in Article VI, § 2, of the Constitution. The foreign governments that object to HVIRA, and which are joined in their opposition by the Executive Branch, may negotiate a treaty with the President and obtain ratification from the Senate. Under Article VI, § 2, "all Treaties . . . shall be the supreme Law of the Land." Treaties were specifically listed in the Supremacy Clause, at least in part, so that the political branches could preempt state law as might be necessary to settle disputes with foreign governments. *See* Ramsey, 75 Notre Dame L. Rev. at 388-90, 404-06 & n.231. Yet the foreign governments opposing HVIRA evidently have not even attempted to negotiate a treaty preempting such state statutes. With regard to the California statute attacked in *Barclays Bank*, its opponents at least negotiated a treaty with the President under which the statute would be preempted, although the treaty was not ratified. *Barclays Bank*, 512 U.S. at 326-27.

Or, opponents of HVIRA could ask Congress to pass a statute preempting HVIRA and other similar statutes, which would equally preemptive under Art. VI, § 2. The

opponents of the California statute attacked in *Barclays Bank* pursued a lobbying effort, unsuccessfully, over a period of decades to obtain legislation preempting that and similar state tax statutes. *Id.* at 324-26. No such effort has been made with regard to HVIRA.

Instead, petitioners and the Executive Branch have brought their complaint to this Court. They rely heavily on a skeletal body of law that addresses expressly preemptive executive agreements. It is an open question whether such executive agreements can, of their own force, preempt state law. *See Barclays Bank*, 512 U.S. at 329 & n.31 (leaving undecided "whether the President may displace state law pursuant to legally binding executive agreements with foreign nations" relying solely on his own powers) (citing *United States v. Belmont*, 301 U.S. 324, 331-32 (1937)).[5] That question need not be addressed in this case, as here the President has not claimed the power to *unilaterally* preempt a state regulation of commerce such as HVIRA on the view that it interferes with foreign relations; indeed, the executive agreements here are expressly non-preemptive. U.S. Br. at 13 (acknowledging that the executive agreements "do not, of their own force, extinguish" otherwise applicable law). Petitioners and their *amici* thus request from this Court a result, based on preferences expressed by the Executive Branch, that the President was unwilling to reach when negotiating executive agreements with the foreign governments that complain of HVIRA. This Court should reject that request. To do otherwise would effectively amend Art. VI, § 2, to give expressly non-preemptive executive agreements the same dignity as treaties or statutes in their ability to preempt conflicting state law.

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[5] *See generally* Ramsey, 75 Notre Dame L. Rev. at 404-06, 412-14, 416-17, 425-29; Saikrishna B. Prakash and Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 Yale L.J. 231, 248-49, 263-64 & n.128, 340-46 (2001); *Goldsmith*, 83 Va. L. Rev. at 1685-86; Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C.L. Rev. 133, 136-37, 152-54, 218-35 (1998).

Unable to identify any action of the political branches sufficient to preempt HVIRA under Art. VI, § 2, the opponents of HVIRA are reduced to invoking the judicially created dormant foreign relations preemption doctrine announced in *Zschernig*, under which they ask this Court to balance various pieces of evidence about possible disruption of foreign relations and preempt HVIRA based on that balancing of factors. In support, they cite various Executive Branch actions and statements (including executive agreements on Holocaust-related issues that do not purport to preempt HVIRA), protests by foreign governments, and *amicus* briefs that collectively, they urge, warrant a finding of preemption. U.S. Br. at 3-5, 13-18, Pet. Br. at 1-9, 13-14, 24-27. This Court considered similar indications of foreign relations concerns in *Barclays Bank*, holding that such arguments, because they invoked "merely precatory" expressions of federal policy that "lack[ed] the force of law," were "directed to the wrong forum" and could not support a finding of preemption. 512 U.S. at 328, 330 & n.32.

For the doctrinal reasons set forth above, we urge the same result here. Further, there are important pragmatic reasons not to regard such arguments as sufficient to establish preemption. If HVIRA actually does pose a serious threat to foreign relations, the ability of Congress and the Executive Branch to gather pertinent information is likely superior to that of the courts, and there is every reason to assume the political branches will take appropriate action. *See* Goldsmith, 83 Va. L. Rev. at 1681-90. For this Court to hold out hope of judicially fashioned preemption "can only discourage the federal political branches from exercising their constitutionally mandated foreign relations responsibilities." *Id.* at 1695. It would also "encourage[] interested groups to seek novel federal foreign relations law in the courts, where the hurdles to lawmaking are generally lower than in the political branches," which hardly comports with the constitutionally envisioned lawmaking process. *Id.* And the whole enterprise of having foreign relations preemption determined not by the political branches but

by the balancing decisions of judges undermines constitutional protections of federalism. As ratified, the Constitution contained few initial restrictions on States' involvement in foreign relations and required action by the federal political branches before more restrictions could be added. *Id.* at 1644-45.

The text and history of the Constitution, separation-of-powers principles, and principles of federalism all support the conclusion that HVIRA is not preempted under the dormant foreign relations preemption doctrine, assuming that this Court refrains at this juncture from overruling that doctrine. See note 4, *supra*.

CONCLUSION

HVIRA imposes a rational, constitutional condition on the sale of insurance within California. Congress has affirmatively ceded regulation of this field of commerce to the States. For this Court to apply the dormant foreign relations preemption doctrine to preempt HVIRA would undermine Congress's ability to exercise its commerce powers by sharing its authority with the States, thereby undermining our system of cooperative federalism. Measures such as HVIRA should only be preempted pursuant to an action of the political branches carrying the force of law and listed in Art. VI, § 2, as preemptive of state law. Petitioners' arguments should be rejected and the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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March 26, 2003

APPENDIX

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Sen. Barbara Boxer	California
Rep. Benjamin L. Cardin	Maryland
Rep. Ed Case	Hawaii
Rep. John Conyers, Jr.	Michigan
Rep. Jim Cooper	Tennessee
Rep. Joseph Crowley	New York
Rep. Tom Davis	Virginia
Rep. Peter Deutsch	Florida
Rep. Mario Diaz-Balart	Florida
Rep. Norman D. Dicks	Washington
Rep. John D. Dingell	Michigan
Rep. Rahm Emanuel	Illinois
Rep. Eliot L. Engel	New York
Rep. Sam Farr	California
Sen. Dianne Feinstein	California
Rep. Mark Foley	Florida
Rep. Barney Frank	Massachusetts
Rep. Martin Frost	Texas
Rep. Jane Harman	California
Rep. Alcee L. Hastings	Florida
Rep. Maurice D. Hinchey	New York
Rep. Michael M. Honda	California
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Rep. Kendrick B. Meek	Florida

Rep. Jerrold Nadler	New York
Sen. Bill Nelson	Florida
Rep. Eleanor Holmes Norton	Washington, D.C.
Rep. John W. Olver	Massachusetts
Rep. Major R. Owens	New York
Rep. Frank Pallone, Jr.	New Jersey
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Rep. Christopher Shays	Connecticut
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Rep. Diane E. Watson	California
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Rep. Robert Wexler	Florida

No. 02-722

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In The
Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, AMERICAN RE-INSURANCE COMPANY, *ET AL.*,

Petitioners,

v.

JOHN GARAMENDI, IN HIS CAPACITY AS COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF BET TZEDEK LEGAL SERVICES AND SIMON WIESENTHAL CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF *AMICI CURIAE*

With the consent of the parties pursuant to Rule 37 of the Rules of this Court, Bet Tzedek Legal Services ("Bet Tzedek") and the Simon Wiesenthal Center ("Wiesenthal Center") submit this brief as *amici curiae* in support of Respondent John Garamendi, Commissioner of Insurance for the State of California.[1]

Bet Tzedek, "The House of Justice," is a non-profit legal services agency that, since 1974, has been providing free and compassionate legal representation to thousands of low-income residents throughout Southern California. Bet Tzedek provides these services to clients of all racial, religious and ethnic backgrounds. It is also, perhaps, the only organization in the United States regularly representing Holocaust survivors, free of charge, in their efforts to secure reparations for the horrors endured during the World War II era. Over the past several years, Bet Tzedek has represented more than 800 Holocaust survivor clients, all of whom are elderly and poor. Bet Tzedek has assisted these Holocaust survivors in their efforts to assert claims under German-based reparations programs, United States-based litigation, and other humanitarian relief programs administered by various international funds or governments.

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[1] Copies of the parties' letters of consent are filed herewith. Pursuant to Rule 37.6, counsel for Bet Tzedek and the Wiesenthal Center certify that no counsel for a party authored this brief in whole or in part and that no person or entity other than they or their counsel has made a monetary contribution to this brief's preparation or submission.

Bet Tzedek has an interest in this case because many of its Holocaust survivor clients have either made claims, or are contemplating filing claims, in various fora, including the International Commission on Holocaust-era Insurance Claims, for payment of insurance benefits due under life and other insurance policies purchased by members of their families prior to the outbreak of World War II. These policies were purchased from, among others, Petitioner insurance companies or their affiliates. The Nazi regime stripped the possessions from the survivors, who therefore have no copies of their insurance policies. Only the insurance companies can be expected to have maintained these records. California's Holocaust Victims Insurance Relief Act of 1999 ("HVIRA"), found at California Insurance Code § 13804, seeks to require insurance companies doing business in California to disclose vital information concerning these policies. Bet Tzedek's clients are interested in accessing this information, through California's reporting statute, so that they may learn their ancestral history and, in an appropriate forum, pursue their claims.

The Wiesenthal Center was founded in 1977 and named after the world famous Nazi hunter Simon Wiesenthal. In its relatively short existence, the Wiesenthal Center has represented the interests of its more than 400,000 family unit members in a variety of human rights concerns and has, through its activism, represented the interests of Holocaust survivors worldwide. From Argentina to Ukraine and every country in between, the Wiesenthal Center has been at the forefront of meeting the needs of survivors. It has engaged in political dialogue with world governmental and spiritual leaders and has engaged in lawsuits on behalf of its members. Throughout its history, the Wiesenthal Center has sought to apply the

lessons of the Holocaust to contemporary social problems. It has created a Museum of Tolerance on its Los Angeles campus that has attracted tens of thousands of visitors, including many school children. It has sponsored many educational endeavors, including films and speakers, to promote education and tolerance in this country and throughout the world. The family members of the Wiesenthal Center number survivors in the tens of thousands. Like Bet Tzedek's clients, the family members of the Wiesenthal Center are interested in accessing the information called for by HVIRA both to learn their family histories and, in an appropriate forum, to pursue their claims.

Holocaust survivors, their heirs and all Californians, as consumers of insurance industry products, may also utilize the disclosures HVIRA requires to make wise and moral purchasing decisions. Thus, Bet Tzedek and the Wiesenthal Center's *amici curiae* brief addresses three discrete issues:

1. The essential role HVIRA plays in protecting Californians;
2. The significance of the beneficiaries' residences in California in establishing that California's contacts are sufficient to enact HVIRA; and
3. The scope of HVIRA's reporting requirements.

SUMMARY OF THE ARGUMENT

The unspeakable horrors of the Holocaust are well known. Some 11 million human beings were murdered in the Nazi death factories, euphemistically referred to as "concentration camps." Six million Jews, one million of whom were children, were exterminated. Over one-third of

world Jewry, and some 60% of European Jewry, was slaughtered. Along with them, also murdered, were Catholics, Gypsies, Slavs, Poles, homosexuals, and others deemed not worthy of life.

But the Nazi butchery of innocents was about more than the extirpation of people deemed to be inferior or inimical to the master race. It was also about the theft, on an unimaginable scale, of the assets of those human beings whom it destroyed. The profit from the bodies of the murdered – gold fillings and human skin – are but small pickings compared to the profit from their looted property: real estate, bank accounts, artworks, investments. Some of this was stolen by governments, but more of it was stolen by entities and persons who sought to profit from Nazi persecutions. And as the Nazis killed with a modicum of secrecy, so did those who sought to profit steal in secret.

As for murder, that modicum of secrecy permitted whole populations, as well as the world-at-large, to avert their gaze. But as for theft, secrecy also had a profit motive. And while, with the war's conclusion, the quasi-secrecy of the death factories came to an end, the secrecy shrouding the ghoulish profit by fellow citizens and European enterprises only increased.

That secrecy, which insurance companies that sold policies to Europeans between 1920 and 1945 are in the forefront of maintaining, is more than an assault on the assets of today's rightful owners. Perhaps more importantly, it is an assault on memory and on love. It is in a real sense a continuation of what the Nazis perpetrated because it treats the people who were murdered, and those whom they loved and sought to protect, as less than human, rightly humiliated and without the basic rights of

property and access to one's own history that most of us take for granted.

Petitioners insensitively, and wrongly, portray these matters as simply irrelevant to California – long distant in the past, involving events far away and people whose lives have no connection to the State. But this is not so. All Californians have an interest in knowing with whom they are doing business: whether those entities that choose to do business in California are honest, economically reliable and socially responsible. One might argue at length whether to conduct business with those who long ago profited off the horrors of decimated peoples, from car manufacturers to pharmaceutical makers. But the argument ceases to be theoretical when even today the profit from the theft continues, and the secrecy is maintained, while those who would seek to learn the truth are willfully humiliated so that the profiteers might gain the trust and confidence of contemporary Californians from whom they seek to profit. Callous insurance companies that profited from the Holocaust need secrecy not only to keep the properties that they stole from corpses, but to continue to do business today with Californians who would be rightly concerned, for both economic and moral reasons, if they learned the truth.

But California has another equally compelling interest here. Petitioners cast their argument in terms of insurance sold in Europe to European policyholders for European beneficiaries – as if no one ever purchased policies from insurance companies that did business in California before 1945, as if no one ever traveled to California before 1945, and as if no Europeans had relatives living in California who they designated as beneficiaries before 1945. How do Petitioners know that no beneficiary

of any policy ever lived in California?[2] Was California free of Jews, and Slavs, and Gypsies, and homosexuals before 1945? Cannot California's legislature rightly assume that *some* policies were entered into by persons who transacted with companies doing business in California, or entered into by persons traveling in California, or for the benefit of persons then residing in California?

Finally, there is another group of Californians, the group that Petitioners do recognize. These are survivors who came here after World War II. These survivors were not omniscient; they did not come to take advantage of non-existent California laws that might someday be enacted, in part, to help them learn the truth. They came to a free country to work, to live, and to rebuild families out of the ashes of death. But their lives do not commence on the date of their arrival. California has an interest in these persons as well – a moral interest and an economic interest. The moral interest is that their memories, and the memories of those who sought to provide for them, be honored with knowledge. The economic interest is that they not be charges of the state, but have knowledge of that which is rightfully theirs so that they may, in an appropriate forum, seek its recovery.

California's HVIRA seeks to break the silence of insurance companies that do business in California. Under HVIRA, the price of doing business in California includes

[2] In this *amici curiae* brief, "beneficiary" refers to any person covered under HVIRA. *See* Cal. Ins. Code § 790.15(b)(1)-(2) (Deering 2003) ("beneficiary means any person or entity entitled to recover under any policy of insurance, including any named beneficiary, any heir of a named beneficiary, and any other person entitled to recover under the policy.").

disclosing the truth. As the Ninth Circuit has held, HVIRA, in furtherance of this goal, is constitutional.

This case is scheduled to be argued in this High Court on April 23, 2003, corresponding in the Jewish calendar to the twenty-first day of the month of Nissan, which is the seventh day of Passover, a holiday celebrating both Jewish freedom from biblical slavery and universal freedom from that which enslaves all people in every era. The Nazi death factories were an obvious form of slavery. But so is ignorance and despair. This case offers this Court the opportunity to bring freedom by shining the light of knowledge into a still-dark corner of the Holocaust – so that consumers can make moral purchasing decisions, so that the humiliated might have an opportunity for a just economic recovery, and so that the despair of injustice might be replaced by the knowledge that mothers and fathers and brothers and sisters cared enough to try to provide for loved ones even during the darkest days of modern European history.

ARGUMENT

I. CALIFORNIA'S HOLOCAUST VICTIM INSURANCE RELIEF ACT IS ESSENTIAL TO PROTECT CALIFORNIANS

A. The Insurance Companies Have Long Thwarted Beneficiaries' Search For Information.

In enacting HVIRA, the California legislature responded to the needs of its citizens for the information they might desire for multiple purposes: to cobble together life stories, to provide survivors and their descendants with monies rightfully theirs, and to protect consumers in their efforts to make informed purchasing decisions. Thus,

HVIRA requires that insurance carriers that choose to conduct business in California and that sold Holocaust-era policies themselves, or through affiliates, report to the Insurance Commissioner, concerning themselves and those companies to whom they are related: the number of policies that were in effect between 1920 and 1945 in Nazi-occupied Europe, the name of the holder and beneficiary of each policy and its current status, information about the place of domicile of the policyholder, whether the policy has been paid, whether diligence has been used to identify beneficiaries, and whether unclaimed funds have been distributed to charitable organizations. Cal. Ins. Code § 13804(a, b) (Deering 2003).

This information is rationally related to the purposes underlying HVIRA. *See Board of Trustees v. Garrett*, 531 U.S. 356, 367 (2001) ("The State need not articulate its reasoning at the moment a particular decision is made. Rather, the burden is upon the challenging party to negative 'any reasonably conceivable state of facts that could provide a rational basis for the classification.'"); *Dittman v. State of California*, 191 F.3d 1020, 1031 (9th Cir. 1999) (quoting *Halverson v. Skagit County*, 426 F.3d 1257 (9th Cir. 1994) ("We do not require that the government's action actually advance its stated purposes, but merely look to see whether the government could have had a legitimate reason for acting as it did.")).

Most victims of the Holocaust had no means to maintain personal records, or to communicate concerning their financial arrangements in such a way as might assure that their information would survive. Declaration of David A. Lash, Executive Director of Bet Tzedek, submitted on May 15, 2000, as Exhibit A to the Brief of Amicus Curiae Bet Tzedek Legal Services to the United States District

Court for the Eastern District of California ("Lash Decl."), ¶ 8. When the Allied forces liberated the death camps, the few who survived began the agonizing search for those they loved: children, parents, brothers, sisters. Any shred of information was prized. But the Nazis and their accomplices left little in plain view. Not only were the human beings who had been exterminated often simply scattered ash, but the records of their dealings, and their provisions for their loved ones, were often destroyed as well. For those who survived, or who are descended from those who survived, the search for knowledge continues to this day.

Because the insurance companies that profited from the Holocaust are known to have maintained their *own* records, the darkened storage facilities of these companies have seemed a worthwhile place to search. Many victims of the Holocaust are likely to have purchased such life, property and other possibly applicable policies prior to the war. Left without records, family members have only anecdotal stories upon which to rely, while the insurance companies hold the keys to the truth and to a potential reservoir of information not otherwise available. The policies secreted away in these dark vaults provide valuable information about victims of the Holocaust, such as their full names, where and when they were born, their health, where they lived, their property, and the names of their relatives. *See e.g.*, Policy Nos. 55283 and 11528 (Joint Appendix ("J.A.") at 72-80). These bits of information are precious to those without a past, not only because people crave roots, but also because the policies may contain detailed information concerning looted art works, other personal property, or even real estate.

But the policies, of course, represent more than information. The life policies are a testament that one's

parents or grandparents cared; the property policies that families were concerned about assuring their financial well-being. And, of course, the policies are the legitimate contractual obligations of the companies that issued them. In the words of Representative Henry A. Waxman:

> Insurance companies holding Holocaust-era policies have a *responsibility* to disclose any information that will help survivors finally reclaim their policies with dignity and equity. In many cases, company archives contain the only existing files related to the countless policies that were stolen from victims of Nazi ghettos and death camps. . . . Insurance companies must be held accountable.

147 *Cong. Rec.* E1507 (daily ed. Aug. 02, 2001) (statement of Hon. Waxman) (emphasis added); *see also* 145 *Cong. Rec.* H9254 (daily ed. Oct. 4, 1999) (statement of Sen. Lazio) ("We know that insurance companies failed to honor policies held by Holocaust victims" and such contemptible practice "demands a full investigation.").

It is unfortunately not surprising that insurance companies that profited from the Holocaust have largely refused to cooperate with anyone who would benefit from the information they have hidden. Rather, the insurance companies have brutally rebuffed and humiliated the Holocaust survivors and their descendants who have attempted to learn the truth. Take the case of one Bet Tzedek client. His father told him in the transport on the way to Auschwitz that he should always remember, in case he survived, that his family had bought life insurance policies. His father said, remember the insurance company "Generali, like the general, remember Generali." Lash Decl., ¶ 9. The son survived; his family, including his father, was murdered at Auschwitz. When the son sought

to follow up on his father's wish and instruction, Generali frustrated him at every turn. First, he was told to wait. *Id.*, ¶ 9. Later, he was told that he had waited too long to make any claim on the policies. *Id.*, ¶ 9. Then he was told the information was in Italy, but that turned out to be untrue. *Id.*, ¶ 9. Next, he was sent to Czechoslovakia, which also proved fruitless. *Id.*, ¶ 9. Another Bet Tzedek client was physically thrown out of an insurance company's offices for simply trying to find out if his policy could be traced. *Id.*, ¶ 9.

Other Bet Tzedek clients have experienced a classic "gotcha" employed by life insurance companies: insurance companies refuse to process any life insurance policies without a death certificate. *Id.*, ¶ 9. Obviously, in his Nazi death factories, Adolf Hitler did not issue death certificates. Some insurance companies perversely excuse their refusal to pay claims on Holocaust-era policies by arguing that the policies lapsed for non-payment of premiums when the insureds were herded into ghettos or transported to death camps where, plainly, they were not able to make premium payments. *The Status of Insurance Restitution for Holocaust Victims And Their Heirs: Committee On Government Reform*, 107th Cong. 17 (Nov. 8, 2001) (statement of Rep. Mark Foley) ("Mr. Falk tried repeatedly to get Winterthur [insurance company] to honor his mother's policy. The company stiffly refused for years, using all of the same excuses: There is no death certificate; you don't have a copy of the policy; even if the policy is or if there was a policy, it lapsed because your loved one stopped paying premiums during the Nazi period.").

Nor have institutional efforts produced better results. The International Commission on Holocaust-Era Insurance Claims ("ICHEIC"), designed to be a non-adversarial

alternative to obtaining insurance policy proceeds, has been derided as doing "a poor job" of locating and paying insurance policies. Stefan A. Riesenfeld, *Symposium 2001: The Holocaust Restitution Movement in Comparative Perspective*, 20 Berkeley J. Int'l L. 11, 21 (2002). This evaluation seems mild: in its first year of operation, the ICHEIC distributed only $3 million to claimants, but spent $30 million in expenses, which included lavish business trips and generous salaries. *Id.*; Greg Garland, *Agency Turmoil Hinders Claims From Holocaust*, The Baltimore Sun, July 7, 2002, at 1A. ICHEIC's failure was not accidental – the insurance companies willfully dragged out the claims settlement process "in order to avoid having to publish lists of possible dormant Holocaust era insurance policies and to enter into settlements which do not accurately reflect the amounts they owe on the dormant Holocaust era insurance policies." Riesenfeld, *supra*, at 22. As of 2001, Allianz AG, the largest German insurance company and a member of ICHEIC, provided only 380 names out of a list of 1.5 million. Henry Weinstein, *Holocaust Claims Still Going Unpaid*, Los Angeles Times, July 9, 2001, at A1; *see also The Holocaust Endures*, The Baltimore Sun, July 14, 2002, at 4F ("European insurers funding ICHEIC . . . have refused to publish complete lists of policyholders from 1930 to 1945."). These lists were to have contained much of the same information now required to be published under HVIRA.

By dragging out the claims settlement process and making it impossible for beneficiaries to identify the responsible company, insurance companies have effectively used ICHEIC to thwart payment on their policies with the motive of burying the claims along with the last generation of

Holocaust survivors. 147 *Cong. Rec.* E1507 (daily ed. Aug. 2, 2001). Not surprisingly, several of the insurance companies unwilling to publish names of insureds in connection with ICHEIC requirements are now contesting HVIRA's reporting requirements in this lawsuit. HVIRA will help California descendants of Holocaust victims identify the insurance company currently responsible on their policies and will, among other matters, facilitate claims being made through ICHEIC. Cal. Ins. Code § 13802 (Deering 2003) ("This chapter is necessary to protect the claims and interests of California residents, as well as to encourage the development of a resolution to these issues through the international process" now being conducted "through the International Commission on Holocaust-Era Insurance Claims.").

The need to disclose Holocaust-era insurance policy information becomes increasingly important as ICHEIC's deadline for submitting claims on these policies, now set for September 30, 2003, draws closer. Press Release, The International Commission On Holocaust-Era Insurance Claims Announces Extension Of Claims Filing Deadline (March 14, 2003) (contact 202-289-4100). *See also* 147 *Cong. Rec.* E1507 (daily ed. Aug. 02, 2001) (statement of Hon. Waxman) ("Although the ICHEIC was established in 1998 to expeditiously resolve unpaid Holocaust-Era claims . . . inquiries filed remain unresolved because the claimants cannot identify the company holding their assets. Furthermore, regardless of their level of compliance with ICHEIC rules insurance companies . . . are given . . . an arbitrary . . . expiration of their obligation to accept claims.").

The proceeds collected by Holocaust survivors may help defray welfare and related costs that the state would otherwise have to pay. *Allstate Ins. Co. v. Hague*, 449 U.S.

302, 319 (1981) (recognizing that Minnesota has interest in ensuring recovery on insurance policy by beneficiary who moved to Minnesota after "occurrence" under policy because "full compensation for 'resident accident victims' . . . keep[s] them 'off welfare rolls' and able 'to meet financial obligations'."); *Alaska Packers Ass'n v. Industrial Accident Comm'n of Cal.*, 294 U.S. 532 (1935) (upholding the application of California workers' compensation law, despite contract term providing for Alaska law, because California had a legitimate public interest in regulating employer-employee relationships). The average age of a Holocaust survivor is more than 70 years. Declaration of Arthur P. Stern ("Stern Decl.") (J.A. at 30), ¶ 7. Many of those survivors, like the 800 represented by Bet Tzedek, are infirm and living below the poverty level. Lash Decl., ¶ 6. Proceeds from their insurance policies, in whatever forum recovered, can ease the pain of poverty and sickness for these victims, reduce California's welfare costs, and make a significant difference during the last few years of the lives of Holocaust survivors.

For the survivors, time is running out. This generation is the last to witness those who endured the Holocaust firsthand. For these people, there can be no greater example of the truism that "justice delayed is, in fact, justice denied." 145 *Cong. Rec.* H9254 (daily ed. Oct. 4, 1999) (statement of Sen. Lazio).

B. HVIRA Provides All Californians With Information About Unscrupulous Insurance Companies Conducting Business In California.

In this age of information, consumers increasingly make purchasing decisions on the basis of social policy

factors in addition to economics. Products, such as apparel, may be rejected because of associated labor practices. Fast-food may not be purchased because of environmental concerns. And the stock of companies that make cigarettes, or promote baby formula in third world countries, may suffer in the marketplace. These are legitimate concerns of a socially conscious consumer, who may rightly look to state government to gather and make public the information necessary to make an informed purchasing decision.

Of course, the integrity of the seller is even more important in the insurance industry. Each purchase (or rejection) of an item of clothing is an infinitesimal economic transaction, and the quality of the apparel is unlikely to be affected by the standard of living of the worker who produced it. Similarly, whether fast-food establishments use excessive paper (or misuse Styrofoam) for packaging will have no impact on the quality of the meal. But insurance is very different. The present willingness of an insurance company, or those with whom it voluntarily chooses to be affiliated, to conceal information about its policies in order to avoid payment may reasonably be seen as a fair indicator of how that company will treat a new purchaser. California consumers deserve to know this information, and HVIRA is rightly designed to provide it. *See Gerling Global Reinsurance Corp. of Am. v. Low*, 296 F.3d 832, 847 (9th Cir. 2002) ("We agree with the Commissioner that the suggested defenses would hamper the state's ability to provide information to Holocaust victims and their families about potentially valid claims, *to protect California citizens from insurance companies that have a history of refusing to pay valid claims or of refusing to inform potential beneficiaries about policy proceeds to which they may be entitled, and to inform California citizens about the character of the family of*

insurance companies from which they are contemplating buying insurance.") (emphasis added).

For all Californians, HVIRA will provide information that will permit informed and moral purchasing decisions. The state can serve no nobler purpose than providing for its citizens the ability to make moral choices, to support themselves economically, and to know the truth. As the United States Congress itself has stated, "'those who cannot remember the past are condemned to repeat it.' But the truth must be established before it can be remembered." 145 *Cong. Rec.* H9254 (daily ed. Oct. 4, 1999) (statement of Hon. LaFalce) (quoting poet and philosopher George Santayana).

II. CALIFORNIA'S CONTACTS WITH THE PARTIES AND THE UNDERLYING POLICIES ARE SUFFICIENT TO SATISFY DUE PROCESS

Petitioners argue that HVIRA violates the Due Process Clause of the United States Constitution because it applies substantive law to a situation with which California has insufficient contacts. Petitioners' Brief at 43. Yet as the Ninth Circuit correctly held, HVIRA does not regulate the substance of out-of-state insurance polices. *Gerling*, 296 F.3d at 842 ("HVIRA's reporting provisions do not seek to regulate the substance of out-of-state transactions. . . . To the contrary, HVIRA requires California insurers only to disclose information about their foreign transactions or those of their affiliates."). Contrary to Petitioners' argument, California's contacts with the parties and the underlying policies are sufficient to satisfy due process.

A. The Beneficiaries' Relocation To And Continued Residence In California Provide California Sufficient Contacts To Enact HVIRA.

Petitioners argue that the beneficiaries' "post-transaction change of residence does not justify" California's enacting HVIRA. Petitioners' Brief at 46. This is an odd argument because the issue here is not whether a particular plaintiff has sufficient contacts with California to invoke California law, but rather whether California has sufficient interest to enact its reporting statute. The beneficiaries' residence in California is a bona fide and significant contact that permits California to enact HVIRA.[3]

None of Petitioners' cases, cited in Petitioners' Brief at 44-45, is relevant here. In *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930), plaintiff brought suit to enforce payment on a fire policy where the policy was entered into in Mexico, the policy specifically provided coverage only in

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[3] Petitioners characterize "at least 5,600 documented Holocaust survivors" as a "small number of Holocaust survivors (or their heirs)" in California "decades after the events in question." Petitioners' Brief at 46. Having dragged out for more than half a century any recovery by refusing, at every turn, beneficiaries' claims, Petitioners and other insurance companies have themselves created today's demographics. *The Status of Insurance Restitution For Holocaust Victims And Their Heirs: Committee On Government Reform*, 107th Cong. 27 (Nov. 8, 2001) (statement of Rep. Ben Gilman) ("[M]any Holocaust survivors and their heirs contacted . . . insurance institutions to seek compensation on their claims but were turned away due to a lack of documentation."). The average age of Holocaust survivors is 70 years. Stern Decl. (J.A. at 30), ¶ 7. Had Petitioners not been so successful in delaying consideration of Holocaust-era claims, far more beneficiaries would be alive today to be directly benefited by this information.

Mexico, the premium was paid in Mexico, the policy specified payment in Mexico, and the policyholder lived in Mexico (although he had a residence in Texas) both when the policy was issued and after the loss. 281 U.S. at 403-404, 407-408. In these circumstances, this Court held that the plaintiff could not invoke Texas law. *Id.* at 408. In *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934), an employee fraud policy was purchased in Tennessee by a Tennessee policyholder from a Tennessee insurer. An employee committed fraud in Mississippi. Since Tennessee law, however, barred recovery under the policy because notice to the insurer had not been timely given, the Tennessee insured brought suit in Mississippi, where recovery was permitted. This Court held that, in these circumstances, Mississippi law was improperly applied. *Id.* at 145-146.

Similarly, Petitioners cite *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), for the proposition that "a party's post-transaction change of residence does not justify a forum state's exercise of legislative jurisdiction over a foreign transaction." Petitioners' Brief at 16. But *Phillips* has nothing to do with a post-transaction change of residence. All *Phillips* holds is that, in the context of a class action brought to recover interest payments on behalf of plaintiffs residing (and acting) "in all 50 states, the District of Columbia and several foreign countries" (*id.* at 799), a Kansas court could not *ipse dixit* simply apply Kansas law to every transaction.[4]

[4] Petitioners' *Amici* Mitsubishi Materials Corporation, *et al.* adds to these citations the case of *Hancock Mutual Life Insurance Co. v. Yates*, 299 U.S. 178 (1936). Motion Of Mitsubishi Materials Corporation, et al., For Leave To File And Brief Amici Curiae In Support Of Petitioners at 24

(Continued on following page)

None of these cases has any application here. The present case has nothing to do with whether a particular Holocaust survivor, or a particular transaction, has sufficient contact with California to justify the application of California law. Nor is any Holocaust survivor seeking to sue in California. To the contrary, the present case raises *only* the issue as to whether California has sufficient interest to legislate certain reporting requirements. The continued residence in California of Holocaust survivors, whenever they came, provides California with sufficient contacts to enact HVIRA. Petitioners' cases simply do not speak to this issue.

Petitioners may be intending to argue by analogy that if a plaintiff cannot change his or her residence to take advantage of a different state's law, then a state cannot enact laws based on its interests in, and the interests of, persons who changed their residences after the events in question to become residents of the state. But the analogy is wrong. A state has an interest in the welfare of its residents and citizens.[5] The state's interests are not a

n.20. There, a policy beneficiary sued in Georgia, where she had moved after her husband's death, on her husband's life insurance policy. The deceased husband had applied for and received the policy in New York, where he had lived with his wife until his death. *Id.* at 179. Because the husband had materially misrepresented his health when he applied for the policy, New York law precluded any payment. Georgia had no such statute. *Id.* at 180. Rejecting the widow's attempt to apply Georgia law, this Court held that New York law applied to the misrepresentations made by the husband while he was living in New York. *Id.* at 182-183.

[5] In *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66, 70 (1954), this Court held that a non-Louisiana insurance company that issued an insurance policy in Massachusetts and delivered it to an Illinois manufacturer in Massachusetts and Illinois was subject to direct suit by a consumer residing in Louisiana. The Court reasoned

(Continued on following page)

function of the length of time of domicile. Moreover, a state's interest in enacting legislation to protect current residents is very different from a person coming to the state, for the purpose of forum shopping, to take advantage of already-enacted legislation. Furthermore, the Holocaust survivors moved to California *before* HVIRA was enacted, and without any intention of being the beneficiaries of such legislation.[6]

Moreover, in many instances, Petitioners' affirmative acts of concealment have been perpetrated against California citizens in California. One California resident, Alexander Weiss, remembers that his father bought insurance policies in anticipation of the Nazi invasion of Czechoslovakia. He recalls "seeing some greenish looking coupons" bearing the name of the insurance company: Victor Zum Berlin. Declaration of Alexander Weiss submitted with

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that even though the policy forbade direct suits, Louisiana had a legitimate interest in applying its law to protect the plaintiff. *Id.* at 68-73. This Court stated, "That [Due Process] principle is inapplicable to this case because, as we have just decided, Louisiana has a constitutional right to subject foreign liability insurance companies to the direct action provisions of its laws whether they consent or not." *Id.* at 73-74. If a state may compel an insurance company to defend litigation within the forum without its consent, it must follow that a state also has the lesser power to compel an insurance company that has chosen to conduct business within the forum to report on its, and its affiliates', activities.

[6] Many Holocaust survivors and beneficiaries have been residents and citizens of California, domiciled in California, for as long as half a century. Declaration of Rabbi A. Cooper ("Cooper Decl.") (J.A. at 25), ¶ 6 ("Many of those refugees eventually emigrated from Europe and settled in various places around the globe, including the United States."); Stern Decl. (J.A. at 29), ¶ 8 ("Based on my knowledge of the Jewish community of California I believe that there are over 22,000 Holocaust survivors living throughout the state.").

Holocaust Survivors/Insurance Claims – Questionnaire. (Excerpt of Record, No. 1 ("1-ER") at 448). After the invasion, the Nazis rounded up Alexander's entire family and imprisoned them in concentration camps. 1-ER at 446. Although Alexander, his mother and his sister survived the concentration camps, his father did not. 1-ER at 447. Alexander then moved to California, where he attempted to collect on the insurance policies that his father had purchased prior to the war. 1-ER at 446. But the insurance companies refused to release any information. 1-ER at 455; *see also* Lash Decl., ¶¶ 3, 9 ("Bet Tzedek has been involved in litigation efforts to secure insurance benefits for the Holocaust survivors who have been denied proceeds . . . and simply ignored.").

Finally, to the extent that the analogy has any merit, it supports Respondent's position. "Under the modern approach to choice of law, interest analysis, nothing is more significant to the question of which state's law should apply than the *domicile* of the parties." Jeffrey L. Rensberger, *Who Was Dick? Constitutional Limitations on State Choice of Law*, 1998 Utah L. Rev. 37, 44 (1998) (arguing that the plurality in *Allstate Ins. Co. v. Hague* created a legal fiction about the policyholder's domicile in *Home Ins. Co. v. Dick* in order to align *Dick* with modern choice of law but should have overruled *Dick* instead) (emphasis added). Indeed, this Court has recognized that *Dick* was an "extreme example[ ] of selection of forum law" because the contacts [of the policyholder] with the forum state were virtually non-existent. *Allstate Insurance Co. v. Hague*, 449 U.S. at 311 (refusing to apply *Dick*).

Allstate Insurance Co. v. Hague is particularly instructive in this regard. There, Mrs. Hague, the beneficiary of her deceased husband's automobile policy, filed her

lawsuit to recover on the policy in Minnesota. This Court held that Mrs. Hague's move from Wisconsin, where she lived with her husband at the time of his accident, to Minnesota constituted a contact with Minnesota that permitted Minnesota to apply its law. *Id.* at 319. This Court particularly noted that Mrs. Hague moved to Minnesota to marry and live with her new husband, a Minnesotan – *not* to take advantage of Minnesota's statute, which permitted uninsured motorist coverage to be stacked. This Court also noted that Mrs. Hague moved *before* she filed her lawsuit. Thus, because her "change of residence was bona fide and not motivated by litigation considerations," Mrs. Hague had not engaged in forum shopping. *Id.* at 319 and n.28.

Holocaust survivors and beneficiaries, of course, moved to California for reasons entirely unrelated to HVIRA. The California legislature could rightly presume that some moved to escape the Holocaust, Cooper Decl. (J.A. at 25), ¶ 6, and that others, who had suffered through and survived the Holocaust, came after the war hoping to reconnect with family living in California. The legislature also could presume yet other Holocaust survivors relocated to California with the desire to become, once again, part of an established Jewish community. All these beneficiaries shared a desire, evidenced by their move to California, to live in safety and security, in a land where the state would protect and support, rather than attack and kill, them. In all their briefing below and before this Court, Petitioners cite to no evidence that *any* beneficiary moved to

California to take advantage of HVIRA. Indeed, any such assertion is preposterous.[7]

For these reasons, Petitioners' citation to purported post-transaction change of residence cases has nothing to do with whether a state may enact laws partially or wholly intended to benefit persons who moved to the state after the events in question. Moreover, to the extent that the analogy is meaningful, *Allstate Insurance Co. v. Hague* reveals that it supports Respondent's position because Holocaust survivors and beneficiaries were not forum shopping when they determined to rebuild their lives in California.[8]

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[7] More than 13,972 Holocaust survivors already had moved to California by the time HVIRA was enacted. Stern Decl. (J.A. at 29), ¶ 3 ("In 1998 the Jewish Federation of Greater Los Angeles conducted a demographic survey. . . . That survey reveals that, as of July 1997, there are approximately 13,972 Holocaust survivors who live in Los Angeles. The number of survivors actually may be much greater, however since the definition[ ] of a 'Holocaust survivor' has been expanded by California law. . . . "). *See also* Cal. Ins. Code § 13801(d) (Deering 2003) ("At least 5,600 documented Holocaust survivors are living in California today.").

[8] Even where a post-transaction change of residence is motivated by forum shopping, application of the forum law does not necessarily violate Due Process. "[I]n a given case the danger of forum shopping . . . may be real, but it seems that *this factor has played a disproportionate and unwarranted role in refusing to consider the interplay of the various interest factors* which exist at time of trial [or when a statute is enacted]." Note, *Post Transaction or Occurrence Events in Conflict of Laws*, 69 Colum. L. Rev. 843, 851 (1969) (arguing that "interest theory logically demands that consideration be given to . . . post contract events in determining the proper choice of law") (emphasis added).

B. The Insurance Companies' Choice To Conduct Business In California Provides California Sufficient Contacts To Enact HVIRA.

HVIRA applies to all insurance companies "currently doing business" in California. Cal. Ins. Code § 13804(a) (Deering 2003). These business ties between California and the insurance companies who choose to conduct business in California are important contacts that give California an interest in supervising the companies' obligations insofar as they affect California and Californians. HVIRA is designed to protect Holocaust survivors, their descendents, and *all California residents doing business, or that may do business, with California insurance companies*. Cal. Ins. Code § 13801(f) (Deering 2003) (emphasis added).

Even the limited information that HVIRA has revealed to date teaches that at least two European insurance companies that sold Holocaust-era policies have longstanding ties to California. MONY Life Insurance Company (formerly The Mutual Life Insurance Company of New York), sold 6,149 policies to persons in Europe between 1920 and 1945, while it was licensed to do business in California. Respondent's Joint Appendix ("Resp. App.") at 36. Similarly, Generali Insurance Company, Ltd. of Trieste and Venice – a Petitioner here – has been licensed to do business in California since 1935. 1-ER at 873. These voluntary contacts with California negate any argument of unfair surprise or frustration of legitimate expectations as a result of California's choice of law. *Hague,* 449 U.S. at 317-318 n.24. By virtue of their presence in California, Petitioners can hardly claim "surprise that the state courts might apply forum law." *Id.* at 317. *See also Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179, 182 (1964) (holding

that an insurance company licensed to do business in the forum state must have known forum law would be applied).

Indeed, California insurance companies, including Petitioners, have been subject to California reporting statutes other than HVIRA while conducting business in California. Cal. Bus. & Prof. Code § 801(a) (Deering 2003) (requiring that "every insurer providing professional liability insurance to a person who holds a license . . . under any agency . . . shall send a complete report to that agency"); Cal. Ins. Code § 1215.4(g) (Deering 2003) (providing that "every person in an insurance holding company system subject to registration is required to provide the insurer with all information reasonably necessary to enable the insurer to comply with the provisions of this article"). Thus, not only must Petitioners have expected California reporting statutes such as HVIRA to apply to them, they actually have experienced the application of such statutes.

Amici Mitsubishi Materials Corporation, *et al.*, would have this Court believe that foreign insurers never anticipated any burden would attach to their choice to conduct business in California. *See* Motion of Mitsubishi Materials Corporation For Leave To File And Brief *Amici Curiae* In Support Of Petitioners at 21. But as this Court has recognized, the very nature of the insurance industry belies this contention. *Clay*, 377 U.S. at 182 (1964) ("Insurance companies, like other contractors, do not confine their contractual activities and obligations within state boundaries. They sell to customers who are promised protection in States far away from the place where the contract is made."). Indeed, some Holocaust-era insurance polices contain specific provisions contemplating worldwide coverage. For

example, one policy states: "After the Policy has been in effect for six months, it will also cover dangers of travel and changes of domicile outside Europe." Policy No. 55283, attached as Exhibit 1 to Kaplan Decl. (J.A. at 77), ¶ "*Travels.*" By including ambulatory coverage, an insurer must have anticipated the possibility that the law of other jurisdictions might apply. *Hague*, 449 U.S. at 319 n.24 (holding that continental coverage and lack of choice-of-law clauses created legitimate expectation that forum law would apply); *Clay*, 377 U.S. at 182 (holding that nation-wide coverage of policy and lack of choice-of-law clause created legitimate expectation that forum law would apply).

California has sufficient contacts to constitutionally enact HVIRA. The beneficiaries who live in California chose to rebuild their lives here after the war for reasons plainly unrelated to HVIRA. Moreover, Petitioners' choice to profit from conducting business in California negates any element of surprise or unfairness in enacting HVIRA.

III. HVIRA IS NOT OVERBROAD BUT IS RATIONALLY RELATED TO CALIFORNIA'S INTEREST IN MAKING PUBLIC LONG-CONCEALED AND IMPORTANT INSURANCE POLICY INFORMATION

Petitioners are simply wrong in suggesting that HVIRA's reporting requirements are so overbroad as to be unreasonably burdensome. *E.g.*, Petitioners' Brief at 17, 26, 36 (using language such as "onerous," "burdensome" and "voluminous"). As this Court has held:

> The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident or out of harmony with a particular school of thought.

Williamson v. Lee Optical of Okla., 348 U.S. 483, 488 (1955) (holding that a statute which forbade opticians to fit or duplicate lenses without a prescription from an ophthalmologist or optometrist was rational and valid under Due Process). Indeed, "'[f]or protection against abuses by legislatures the people must resort to the polls, not to the courts.'" *Id.* (quoting *Munn v. Illinois*, 94 U.S. 113, 114 (1876)).

Petitioners do not dispute that the California legislature may enact laws that it "rationally could have believed" would promote legitimate state interests. *Western & Southern Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648 (1981) (upholding retaliatory tax statute because California legislature could have believed the statute would promote its objective of influencing other states to drop their retaliatory taxes). Moreover, Petitioners have not demonstrated, and cannot, that HVIRA's requirements are any more burdensome than necessary to provide relevant information not only to beneficiaries and Holocaust survivors, but to all Californians. To restrict HVIRA's disclosure requirements would defeat the statute's purpose to make long-concealed and important insurance policy information available to all Californians, including Californian Holocaust victims. The information required under HVIRA is neither arbitrary nor irrational.

First, to limit disclosure only to policies that list policyholders or beneficiaries as California residents would be impossible because many policies would not on their face identify policyholders or beneficiaries as California residents – even though the individuals may

now be California residents, and may have been for many years.

Second, to limit disclosure to Holocaust victims would necessarily result in incomplete reporting because the insurance companies' files do not describe policyholders by race, religion or other characteristics that would identify them as victims. Cooper Decl. (J.A. at 26), ¶ 10; A Teachers Guide to the Holocaust, *Victims, at* http://fcit.coedu.usf.edu/holocaust/people/victims.htm (last visited March 15, 2003) (listing Jews, Gypsies, Poles, Slavs, dissenting clergy, political dissidents, disabled, Jehovah Witnesses, homosexuals, and others as Holocaust victims).

Third, to limit disclosure to only "unpaid" policies utterly defeats the purpose of HVIRA. Insurance companies disagree with survivor representatives and the California legislature over the meaning of the term "unpaid" policy. Many insurers, for instance, consider policies confiscated by the Nazis and policies paid into blocked accounts to have been "paid." Cooper Decl. (J.A. at 27), ¶ 12. If insurance companies were required to provide information on only those policies *they* consider "unpaid," they would prefilter the list to exclude policies that the California legislature and Holocaust survivors consider "unpaid." Cooper Decl. (J.A. at 27-28), ¶ 12.

Fourth, to limit disclosure to situations where the name of the insured identified by the claimant perfectly matches the name of the insured in the company's files would be impossible. The exact spelling of family names varies depending on the language used and how the name is translated or transliterated into English. Cooper Decl. (J.A. at 25-26), ¶ 9. Moreover, the exact name under which a family member may have sought a policy is likely to be impossible to know. By instead publishing a list of

information that includes the policyholders' addresses in addition to their names, as HVIRA requires, survivors and heirs might recognize their relatives' names.

Finally, whether HVIRA is burdensome to Petitioners is irrelevant. The rational basis analysis tests "the rationality of the government action *regardless of its impact.*" *Halverson v. Skagit County*, 42 F.3d 1257, 1262 (9th Cir. 1994) (upholding a Washington county law that created diking districts without first providing pre-taking compensation even though the dikes later contributed to residential flooding) (emphasis added). HVIRA need not be the least restrictive means to achieve its permissible end. *Scariano v. Justices of Sup. Ct. of Ind.*, 38 F.3d 920 (7th Cir. 1994) (upholding Indiana law that Sup. Ct. of Ind. out-of-state practitioners from the bar examination if they practice predominately in Indiana for a period of five years); *Hoffman v. United States*, 767 F.2d 1431, 1437 n.7 (9th Cir. 1985) (upholding California law that limited noneconomic damages in medical malpractice suits). State regulations much more intrusive and costly to private businesses than HVIRA's reporting requirements routinely have been upheld under the rational basis test. *See e.g.*, *California Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974) (holding that cost burden on banks to comply with record-keeping requirements of Bank Secrecy Act did not deprive banks of due process of law); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (upholding state prohibition on sale of milk in plastic, nonreturnable, nonrefillable containers); *United States v. Carolene Products Co.*, 304 U.S. 144 (1937) (upholding Congressional prohibition on sale of "filled milk" in interstate commerce); *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1948)

(discussing state legislature's broad power to enact business and industrial regulations).

Petitioners' suggestion that HVIRA fails the rational basis test because it is overbroad, burdensome and fails to use the least restrictive means are all legally irrelevant. HVIRA need only be drafted to achieve its legitimate purpose – to obtain insurance policy information – and there is no question that HVIRA accomplishes this.

CONCLUSION

For the forgoing reasons, as well as those stated in the Respondent's Brief, it is respectfully submitted that this Court should affirm the determination below.

Respectfully submitted,

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In The
Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, *et al.*,

Petitioners,

v.

JOHN GARAMENDI,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, NEVADA, NEW JERSEY, NEW YORK, OHIO, TEXAS, AND WASHINGTON AND THE COMMONWEALTH OF PUERTO RICO, AS AMICI CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Holocaust Victim Insurance Relief Act (HVIRA) – a California statute that requires insurance companies doing business in the State to report policy information regarding policies that it or its affiliates issued during the Holocaust-era – violates the Constitution's foreign affairs provisions where Congress has encouraged States to obtain Holocaust-era insurance information from foreign and domestic insurance companies, where the statute is not preempted by any treaty, statute, or executive agreement, and where the statute is evenhanded and does not insult or attempt to influence any foreign government.

2. Whether the HVIRA is within the historic police power of States, and therefore meets the legislative jurisdiction requirements of the Due Process Clause, because the statute (a) is directed to insurance companies doing business in California; (b) requires those companies to provide critical policy information needed for California residents to perfect their insurance claims; and (c) helps ensure that companies and their affiliates selling insurance to California's residents meet the State's high ethical standards.

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INTEREST OF THE AMICI STATES

Petitioners seek expansive interpretations of the Constitution's foreign affairs provisions and of the Due Process Clause that would have serious, far-reaching consequences for the amici States. Petitioners' attempt to prevent States from gathering information regarding business practices simply because the data concerns foreign activities, or activities of "affiliates" of an individual or business, would erode essential attributes of State sovereignty. States could be unduly constricted in their ability to learn about and use out-of-state conduct to evaluate professional licence applications, determine whether companies are fit to do business in the State, set criminal sentences, issue gun permits, and otherwise exercise their historic police power.

1. Under petitioners' broad interpretations, for example, States could be limited in their right to obtain information from state charities as to whether funds are being diverted to foreign terrorist organizations or to other improper purposes overseas.[1] States could likewise be hampered in ensuring that gambling operators licensed to do business in the State have no connections to foreign

[1] See Cal. Gov't. Code § 12598 (West 2003), and Corp. Code § 5250 (West 2003), giving the California Attorney General supervisory authority over charitable trusts. A sampling of the many other States with similar oversight provisions includes Georgia (Ga. Code Ann. § 53-12-116 (2002)), Idaho (Idaho Code § 67-1401 (2002)), Illinois (760 Ill. Comp. Stat. 55/7 (2003)), Massachusetts (Mass. Ann. Laws ch. 12, § 8F (2002)), Michigan (Mich. Stat. Ann. § 14.254 (2002)), New York (N.Y. Est. Powers & Trusts § 8-1.4 (2002)), Ohio (Ohio Rev. Code Ann. § 109.24 (Anderson 2002)) and Oregon (Or. Rev. Stat. § 128.670 (2001)).

criminal syndicates.[2] Criminal justice departments could be constrained in their ability to obtain information from contractors and others prior to issuing sensitive security clearances. States that ban their civilian residents from possessing machine guns, grenades, explosive missiles, and other military weapons could be restricted from requesting information from manufacturers regarding foreign sales that may be the source of illegal weapons smuggled into a State.[3]

2. Further, the amici States have an interest in seeing that insurance companies doing business in their States disclose policy information that will enable Holocaust survivors and their heirs to seek insurance benefits they are entitled to receive under their insurance policies. There are, for example. an estimated 20,000 Holocaust survivors currently living in California.[4] The survivors are

[2] See Cal. Bus. & Prof. Code §§ 19826(b) and (c) (West 2003) (State entity's responsibilities for monitoring and investigating gambling licensees). Examples of other States with similar statutes are Iowa (Iowa Code § 99F.4 (2002)), Montana (Mont. Code Ann. § 23-5-176 (2002)), Nevada (Nev. Rev. Stat. § 463.140 (2002)) and State of Washington (Wash. Rev. Code §§ 9.46.070, 9.46.075, 9.46.130, 9.46.140 and 9.46.153 (2002)).

[3] See Cal. Pen. Code §§ 12200, 12234, 12250, 12276, 12287, 12289.5, 12301, 12305 (West 2003) (weapons) and Cal. Gov't. Code §§ 11180-11191 (West 2003) (investigations). A few of the many other States that require the registration and production of information concerning military weapons include Colorado (Colo. Rev. Stat. §§ 9-7-103, 9-7-106, 9-7-109 (2002)), Maryland (Md. Code Ann., Criminal Law § 4-403 (2002)), New Jersey (N.J. Stat. §§ 2C:39-1 and 2C:58-1 (2002)) and New York (N.Y. Penal Law §§ 265.00 and 400.00 (consol. 2002)).

[4] See L.A. Times, May 11, 2001, at pt. 2, p. 5, *available at* LEXIS, News Library (estimate of 22,000 California survivors). Also see Sacramento Bee, April 26, 2000, at p. A1, *available at* LEXIS, News Library (20,000 estimate). (That estimate may be low due to recent

(Continued on following page)

elderly.[5] For them, the phrase "justice delayed is justice denied" is particularly apt. Each significant delay in the disclosure of critical policy information reduces the number of Holocaust survivors that will be alive to obtain justice.

Moreover, petitioners' implication that survivors will obtain relief from the limited number of insurance companies that have participated in the International Commission on Holocaust Era Insurance Claims (ICHEIC) is unsupported. A recent congressional report concluded that the ICHEIC effort to resolve Holocaust-era insurance claims is not succeeding. One of the main reasons cited was the insurance companies' strategy of delay in producing policyholder names:

> There are five insurance companies that signed the Memorandum of Understanding (MOU) that established ICHEIC. In general, however, their participation has been marked by delay and

immigration from the former Soviet Union. See *Id.*) When California's Holocaust Victim Insurance Relief Act (HVIRA) was enacted, there were 5,600 actually documented Holocaust survivors living in California. Cal. Ins. Code § 13801(d) (West 2003).

Although national estimates vary, the American Red Cross cites a figure of 280,000 survivors and family members living in the United States. See http://www.redcross.org/services/intl/holotrace/questions.html (visited March 4, 2003).

[5] See, for example, *US, European Insurance Regulators Gather in London on Holocaust Claims,* Agence France Presse, June 10, 1998, *available at* LEXIS, News Library (reporting on a meeting of United States and European insurance regulators in London): "US regulators were anxious to settle the claims as quickly as possible because the average age of US [Holocaust insurance] claimants is 82." See also ER 1700 (average age of Holocaust survivor, in Los Angeles County, is over 70 years of age).

obstruction. These companies have failed to provide comprehensive lists of policyholder names.[6]

3. Finally, the amici States have an interest in ensuring that, by resisting disclosure, petitioners do not obtain an unfair financial advantage over the many companies that have reported essential policy information.[7] Companies that disclose this information – and then pay legitimate claims – incur economic liabilities that resisting companies avoid.

For all of these reasons, the amici States strongly oppose petitioners' expansive interpretations of the Constitution and their attempts to withhold critical policy

[6] See *The Status of Insurance Restitution for Holocaust Victims and Their Heirs*, Minority Staff, Committee on Government Reform, U.S. House of Representatives (Nov. 13, 2001), http://www.house.gov/reform/min/maj/maj_holocaust.htm (then go to "Hearings on Holocaust Insurance Restitution, November 8, 2001"). *Also available at* LEXIS, U.S. Congress Library.

[7] Companies that have disclosed Holocaust-era information to the California Department of Insurance include Mutual of New York, as well as the California affiliates of Dutch insurers that are members of the Dutch Insurance Association (Soja). Mutual of New York, for example, complied with the HVIRA by providing the requisite information regarding approximately 33,000 policies. The policy information provided by these companies is available on the California Department of Insurance website. See http://www.insurance.ca.gov/docs/FS-Holocaust.htm (go to "Policyholder Lists"; visited March 3, 2003). In addition, the American affiliates of Aegon N.V., British Prudential Insurance Group, Fortis (NL), ING Group and The MONY Group have provided extensive policy information to the Washington Department of Insurance. See www.insurance.wa.gov (go to "Information for Consumers," then "Holocaust and Insurance," then "Click here for a list of names of the American affiliates * * *."; visited March 3, 2003).

information that Holocaust survivors need to submit their insurance claims.

SUMMARY OF ARGUMENT

1. Petitioners assert that the HVIRA's reporting requirements allegedly violate foreign affairs provisions that are both generally implied in the United States Constitution, and specifically contained in the Commerce Clause. Congress, however, has *encouraged* States to obtain Holocaust-era insurance information from foreign and domestic insurance companies. Under this Court's decision in *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994), that congressional support defeats petitioners' foreign affairs challenge.

2. Even absent such congressional encouragement, the HVIRA would not violate the Constitution's foreign affairs provisions. The Act constitutes a legitimate effort by the State of California to provide for the welfare of its residents. It seeks information from corporations doing business in California that is needed for California residents to perfect their Holocaust-related claims. Moreover, it is evenhanded – it does not try to judge, or alter, the policies of foreign governments, but instead seeks information from all insurance companies doing business in California, and related companies, that issued policies in Europe between 1920 and 1945.

3. Finally, the HVIRA does not exceed California's legislative jurisdiction under the Due Process Clause. The States' historic police power is especially broad in the area of insurance company regulation. It fully includes the right of a State to require insurance companies doing

business in the State to disclose insurance policy information that, among other things, reflects upon the ethical integrity of the company and its affiliates.

ARGUMENT

I. CONGRESS HAS ENCOURAGED STATE INVOLVEMENT IN RESOLVING HOLOCAUST-ERA INSURANCE CLAIMS, THEREBY UNDERCUTTING ANY FOREIGN AFFAIRS AND COMMERCE CLAUSE CHALLENGE TO THE HVIRA.

Petitioners assert that the policy reporting requirements of the HVIRA violate foreign affairs provisions in the United States Constitution. In support of this claim, petitioners principally rely upon *Zschernig v. Miller*, 389 U.S. 429 (1968), the only decision by this Court striking down a state statute based upon the general foreign affairs powers that it found to be implied in the Constitution. This brief will show, however, that the controlling case in the instant lawsuit is not *Zschernig*, but rather the Court's significantly more recent decision in *Barclays Bank PLC v. Franchise Tax Bd. of Cal., supra*, 512 U.S. 298, which held that congressional acquiescence regarding a state policy negates any constitutional foreign affairs infirmity. This brief will then show that Congress not only acquiesced, but actively supported – through both legislation and congressional statements – efforts by California and other States to obtain Holocaust-era benefit information from insurance companies.

A. *Barclays*, Not *Zschernig*, Provides the Most Appropriate Test for Reviewing Petitioners' Foreign Affairs Challenge of the HVIRA.

1. In *Barclays*, the petitioners challenged the constitutionality of California's multinational corporate tax. They not only presented a specific dormant Commerce Clause claim, but they – like the petitioners in this case – also brought a general foreign affairs challenge. Relying heavily on *Zschernig*, they asserted that "[w]here state legislation or action interferes with the conduct of foreign affairs by the Federal Government, the Constitution itself preempts it." See Petitioner's Brief for Barclays Bank PLC, LEXIS 1992 U.S. Briefs 1384 (Argument II) (December 15, 1993). Although this Court did not expressly cite *Zschernig* or a foreign affairs doctrine per se, it rejected petitioners' charges that California's multinational corporate tax violated the Commerce Clause by frustrating the ability of the federal government to "speak with one voice when regulating commercial relations with foreign governments." *Barclays*, at 302-303 (citation and internal quotation marks omitted).

Petitioners in *Barclays* had argued that California's statute must be deemed an unconstitutional state intrusion into foreign affairs, because the statute was opposed by a host of major foreign governments (the British Parliament went so far as to enact retaliatory legislation [*Barclays* at 324, n.22]), and because the statute was opposed by the Executive Branch as an impermissible state intrusion into foreign affairs. *Id.* at 328. This Court, however, rejected these arguments. It explained that, at least as to matters that affect commerce, under the Constitution it was the job of *Congress*, not the Executive

Branch, to determine whether a State has improperly intruded into foreign affairs. *Id.* at 329.

Moreover, *Barclays* explained that Congress need not make that determination affirmatively, but can make it "implicitly" through "acquiescence." *Barclays* at 326 and 330. See also A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 Yale J. Int'l L. 1, 25 (1995) ("*Barclays Bank* proceeds on the principle that congressional acquiescence in a State practice affecting the commercial aspect of foreign relations is sufficient to validate that practice even if its negative effect on American dealings with other countries is demonstrable.").

2. *Zschernig* is the only decision of this Court to invalidate a State law based upon a general foreign affairs doctrine.[8] *Zschernig* involved an Oregon inheritance statute, under which property escheated to the State when a nonresident alien claimed the property unless, inter alia, there was a reciprocal right of United States citizens to take property on the same terms as a citizen of the foreign country. *Id.* at 430-431. Previously, this Court had upheld a similar California statute against a similar attack. See *Clark v. Allen*, 331 U.S. 503 (1947). This Court in *Zschernig* explicitly declined to overrule *Clark*. *Zschernig* at 432. Instead, it held that while the statute reviewed in *Clark* was valid on its face, the Oregon statute was invalid because of the way it was being applied.

[8] "The only case in which the Supreme Court has struck down a State statute as violative of the foreign affairs power is *Zschernig*." *International Ass'n of Indep. Tanker Owners v. Locke*, 148 F.3d 1053, 1069 (9th Cir. 1998), *rev'd in part on other grounds sub nom. United States v. Locke*, 529 U.S. 89 (2000).

Specifically, the *Zschernig* Court found that the Oregon statute was being used as a weapon in the Cold War. Courts were searching "for the 'democracy quotient' of a foreign regime as opposed to the Marxist theory." *Id.* at 667-668. Reviewing State court opinions applying the Oregon statute, this Court found that "[a]s one reads the Oregon decisions, it seems that foreign policy attitudes, the freezing or thawing of the 'cold war,' and the like are the real desiderata." *Id.* at 668-669. Although previously, this Court had only struck down State statutes based upon federal *preemption*,[9] for instance, where they conflicted with the Commerce Clause (see *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875)), a federal statute (see *Hines v. Davidowitz*, 312 U.S. 52, 73 (1941)), or an international compact (see *United States v. Pink*, 315 U.S. 203, 229 (1942)), *Zschernig* held that even absent such preemptive provisions, a State statute could contravene foreign affairs provisions that it read into the Constitution.

This Court's post-*Zschernig* decisions have avoided that opinion's nebulous foreign affairs doctrine. Most significantly, in *Barclays* this Court solely relied upon Commerce Clause jurisprudence in upholding the constitutionality of California's multinational tax. If a more restrictive foreign affairs doctrine had applied, however, then *Barclays* would have presumably needed to determine whether, even if California's statute was consistent with the Commerce Clause, it violated *Zschernig's* foreign affairs doctrine. (As previously noted, the petitioners in *Barclays* specifically alleged that California's tax violated

[9] See Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617, 1649-1650 (1997).

the *Zschernig* doctrine.) The fact that *Barclays* did not proceed to that review implies that it rejected the applicability of a stricter foreign affairs doctrine.[10]

3. *Barclays'* reliance on the Commerce Clause, rather than on an amorphous foreign affairs doctrine, is consistent with the approach followed by the Court elsewhere. Most notably, in the due process context, "where a particular amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Graham v. Connor*, 490 U.S. 386, 395 (1989). The same justification for restraint in the due process context applies here, i.e., "the guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citation and internal quotation marks omitted).

Of all of the constitutional provisions that relate to foreign affairs, the Commerce Clause is the only one that is arguably applicable to the HVIRA. The other foreign affairs provisions concern areas such as naturalization, treaties, the imposition of duties, and the declaration and conduct of war. The HVIRA does not even tangentially implicate any of those provisions. The statute does,

[10] See also *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 388 (2000), which overturned Massachusetts' Burma law on the ground that it was preempted by the federal Burma law. In that case, because the Court invalidated the State statute based upon preemption, it found no need to reach petitioners' *Zschernig* challenge.

however, regulate commerce, namely the conduct of insurance companies doing business in California.

4. *Barclays'* reliance on the Commerce Clause, as opposed to the foreign affairs doctrine created by *Zschernig*, is also consistent with the requirements of the Tenth Amendment to the Constitution, under which powers that are not prohibited, or granted to the United States, are reserved to the States.[11] This Court has explained that "caution should be exercised before concluding that unstated limitations on state power were intended by the Framers." *Alden v. Maine*, 527 U.S. 706, 739 (1999), quoting *Nevada v. Hall*, 440 U.S. 410, 425 (1979).[12]

In the instant case, given that the Commerce Clause is the only foreign affairs constitutional provision that relates to a matter covered by the HVIRA (commerce), combined with the Tenth Amendment's reservation of powers to the States, the logical approach is to review this case under this Court's Commerce Clause jurisprudence. *Barclays'* test should therefore be used in analyzing petitioners' foreign affairs challenge of the HVIRA.

[11] That amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited to it by the states, are reserved to the states respectively, or to the people."

[12] See also Goldsmith, *supra*, 83 Va. L. Rev. 1617, 1642 ("The most natural inference from these provisions and from the Constitution's enumerated powers structure is that all foreign relations matters not excluded by Article I, Section 10 fall within the concurrent power of the state and federal governments until preempted by federal statute or treaty.").

B. Applying *Barclays*, Petitioners' Foreign Affairs Challenge Fails Because Congress Has Encouraged States to Seek Holocaust-era Insurance Information.

While *Barclays* indicated that congressional acquiescence can be sufficient to validate a State's actions that implicate foreign affairs (see *infra* pp. 6-7), in the instant case, Congress has gone further than mere inaction. Congress has *encouraged* the type of State involvement in resolving Holocaust-era insurance claims that is reflected in California's HVIRA.

1. On June 23, 1998, Congress enacted the U.S. Holocaust Assets Commission Act of 1998, Pub. L. 105-186, 112 Stat. 611, as amended Pub. L. 106-155, § 2, 113 Stat. 1740 (1999) (codified at 22 U.S.C. § 1621 note). The Act established the Presidential Advisory Commission on Holocaust Assets in the United States. On December 9, 1999 (two months after California's HVIRA was enacted), Congress amended the statute to extend the term of the Presidential Commission. See P.L. 106-155, 113 Stat. 1740. The Act directs the Commission to obtain information regarding, inter alia, insurance policies and proceeds thereof. U.S. Holocaust Assets Commission Act of 1998, § 3(a)(2)(E). In directing the Commission to obtain Holocaust-era insurance information, Congress *assumed* that the States were actively involved in this area.[13] Rather than expressing an

[13] State activities seeking to resolve Holocaust-era insurance claims included reporting statutes. See, for example, New York's Holocaust Victims Insurance Act of 1998 (N.Y. Ins. Law §§ 2701 and 2705 (consol. 1998)), which required insurance companies to report specified information regarding Holocaust-related policies issued between 1920 and 1945. Similar provisions were subsequently adopted

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intent to occupy the field, Congress encouraged the States to continue such work. Specifically, Congress mandated that the Commission:

> *shall encourage* the National Association of [State[14]] Insurance Commissioners to prepare a report on the Holocaust-related claims practices of all insurance companies, both domestic *and foreign*, doing business in the United States at any time after January 30, 1933, that issued any individual life, health, or property-casualty insurance policy to any individual on any list of Holocaust victims. . . .

U.S. Holocaust Assets Commission Act of 1998, § 3(a)(2)(E) (emphasis added).

2. Moreover, when Congress first enacted the Act in June 1998, it was aware that States were trying to get insurance companies to disclose the type of information covered by California's HVIRA. On February 12, 1998, extensive testimony regarding State activities in this area was presented to the House Committee on Banking and Financial Services. At that hearing, Washington State's Insurance Commissioner explained that: "We have asked the insurers to release complete lists of policyholders, as have the Swiss banks released names of accounts, so that they may be cross-referenced with Holocaust registries

by Florida (Fla. Stat. ch. 626.9543 (1999)), Maryland (Md. Code Ann., Ins. § 28-105 (1999)) and Minnesota (Minn. Stat. § 60A.053 (2000)).

[14] The National Association of Insurance Commissioners "is the organization of insurance regulators from the 50 states." See http://www.naic.org/1misc/aboutnaic/about/about01.htm (visited Feb. 25, 2003).

contained at Yad Vashem or at the Holocaust Museum here in this country." See *The Restitution of Art Objects Seized by the Nazis from Holocaust Victims and Insurance Claims of Certain Holocaust Victims and Their Heirs: Hearing Before the House Comm. on Banking and Fin. Services*, 105th Cong. 131 (1998) (hereinafter "*Insurance Hearing*"). And Congress knew, even before California's HVIRA was enacted, that States might compel insurance companies to provide Holocaust-related policy information. Insurance commissioners from the States of Washington and California, for example, testified that companies might be required to provide needed information upon the threat of losing their right to sell insurance in their States. *Id.* at 132 (Washington) and 142 (California).

The congressional committee did not react by indicating that the States were improperly meddling in international affairs. To the contrary, the States were applauded for their efforts. Then-Committee Chairman Jim Leach thus responded to the Insurance Commissioners' testimony as follows:

> Thank you, just in concluding, let me say that because this is an issue of international significance, there are aspects of the American system that are not widely understood abroad, and one relates to the Federal nature of America, particularly in the insurance arena, the decision of the United States Congress, in effect, either to devolve or not to assume responsibility for basic insurance regulation, which gives the States a significant role. And that means that as two symbolic State insurance commissioners, there's a great deal of authority that resides in your offices. And it's important that it be understood that this authority is very large, and is large

> because it is assumed it is being appropriately carried out. So I want to simply thank you for your leadership on this issue and not that it is not simply an advocate in nature, that is, there is an enormous authority that rests in a devolved way, in the American Federal system, with the States, and in particular in this area, with the State insurance commissioners. Thank you very much.

Id. at 157.[15]

Thus, as in *Barclays*, Congress was aware of the state activities in question, in this case the efforts of California and other States to obtain information from insurance companies regarding policies issued in Europe during the Holocaust. Congress has not acted to stop those State efforts. Just the opposite. Congress – through the U.S. Holocaust Assets Commission Act of 1998, and congressional statements – has encouraged the States to continue their efforts. As then-Chairman Leach explained, "[t]he committee will be monitoring the progress of private and state efforts, and if required, we're ready to lend a hand."

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[15] This congressional support of State efforts to obtain insurance information continued after the enactment of the U.S. Holocaust Assets Commission Act of 1998. See, for example, the statement of Congressman Brad Sherman commending the efforts of the States of California and Washington (made during the *Restitution of Holocaust Assets: Hearing Before the House Comm. on Banking and Fin. Services*, 106th Cong. 63 (2000)); and Congressman Henry A. Waxman's statement that "[b]ecause of the California law, policy information is getting out of companies' archives and into the hands of the rightful beneficiaries." *Hearing on H.R. 2693 before the Subcomm. on Gov't Efficiency, Financial Management and Intergovernmental Relations*, 107th Cong. (2002) available at http://www/.house.gov/reform/min/maj/maj_holocaust_hearing_sept_24.htm.

Insurance Hearing at 186. Under *Barclays*, the HVIRA therefore withstands any assertion that it is invalid under the foreign affairs provisions in the Constitution.

C. Petitioners Improperly Place Great Weight on Executive Branch Statements.

1. In pressing their foreign affairs claim, petitioners rely heavily on statements by Executive Branch officials. This Court, however, has cautioned that such "Executive Branch actions – press releases, letters and amicus briefs – * * * are merely precatory." *Barclays*, *supra*, 512 U.S. at 329-330. They do not have any substantive weight, absent "the President's power to preempt state law pursuant to authority delegated by a statute or a ratified treaty"; or possibly authority based upon "legally binding executive agreements." *Id.* at 329. *Cf. Crosby v. National Foreign Trade Council*, *supra*, 530 U.S. 363, 380 (Such statements are properly considered where a federal statute directs the President to develop a "comprehensive, multilateral strategy" in a field.).

2. In addition to citing Executive Branch statements, petitioners argue that "executive agreements * * * conflict with the HVIRA" and that these "[e]xecutive agreements have the same force as treaties or statutes." Pet. Br. 28. There are two basic flaws with petitioners' argument. First, *Barclays* expressly left open the question of "whether the President may displace state law pursuant to legally binding executive agreements with foreign nations." *Barclays* at 330. Second, as the United States itself has acknowledged, that question is not even present in

this case. Although the Executive Branch entered into an agreement with Germany in 2000 (Pet. App. 153a-168a),[16] by it terms it does not displace the HVIRA's reporting requirements. Thus, in its Ninth Circuit Court of Appeals brief, the United States emphatically denied that the German agreement preempts the HVIRA. Resp. App. 49. Rather, it candidly admitted that the agreement "specifically declares that '[t]he United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal' of private claims." Resp. App. 48 (emphasis added); see also Pet. App. 167a. The United States therefore explained that petitioners were "mistaken [to the extent that they] suggest that the Agreement by its terms preempts the California statute." Resp. App. 48-49.

Moreover, the German agreement only applies to lawsuits seeking damages or similar relief, not to reporting statutes. By its terms, the agreement is limited to "cases * * * in which * * * a claim has been asserted against German companies." Pet. App. 165a; see also Pet. App. 155a. No claim for damages or other relief has been asserted against any company in the instant lawsuit; rather, companies doing business in California instituted these lawsuits to challenge California's reporting requirements. This Court does not, therefore, need to consider the *Barclays'* question of whether a legally binding executive agreement can displace state law, because the instant agreement does not attempt to displace the HVIRA.

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[16] The Executive Branch also entered an almost identical agreement with Austria. See Pet. Br. 8.

3. Congress, "whose voice, in this area, is the Nation's," *Barclays* at 331, being fully informed of state activities seeking to obtain insurance policy information, has been supportive of the efforts of California and other States. The HVIRA is fully consistent with the congressional intent that the States be encouraged "to prepare a report on the Holocaust-related claims practices of all insurance companies, both domestic and foreign, doing business in the United States * * *." U.S. Holocaust Assets Commission Act of 1998, *supra*, § 3(a)(2)(E). Thus, notwithstanding negative Executive Branch statements, the HVIRA is constitutional.

II. EVEN IF CONGRESS HAD NOT ENCOURAGED STATE EFFORTS, AND EVEN IF *ZSCHERNIG* APPLIED, THE HVIRA WOULD BE VALID.

Absent congressional support, and even if *Zschernig* rather than *Barclays* applied to challenges of state commercial statutes, the HVIRA would not violate any foreign affairs provisions of the Constitution. It is an evenhanded law that seeks to help state residents and to ensure that insurance companies doing business in California meet high ethical standards.

1. The validity of the HVIRA under *Zschernig* is demonstrated by the reasoning underlying the Third Circuit Court of Appeals' decision in *Trojan Technologies, Inc. v. Pennsylvania*, 916 F.2d 903 (3rd Cir. 1990), *cert. denied*, 501 U.S. 1212 (1991). In upholding a State "buy American" statute, *Trojan* explained that under *Zschernig*, statutes that are not intended to punish undesirable

governments, and are applied evenhandedly, do not run afoul of the Constitution's foreign affairs provisions.

The HVIRA is directed to *corporations*, not governments. It does not turn upon the policies or structures of foreign governments. Moreover, its application is not only evenhanded, but is also ministerial. The HVIRA therefore sharply contrasts with the statute in *Zschernig*, which was being applied in accordance with officials' and judges' Cold War attitudes about particular foreign nations. *Id.* at 668-669.

2. The HVIRA also stands in sharp contrast to statutes such as Massachusetts' Burma law. This Court recently invalidated that state law on the ground that it is preempted by a similar federal statute. See *Crosby v. National Foreign Trade Council*, *supra*, 530 U.S. 363, 374. Massachusetts' Burma law generally prohibited that State's agencies from purchasing goods or services from companies that did business with Burma (now Myanmar). An important purpose was to pressure Burma's regime to reform its government. The HVIRA, in contrast, is not seeking to rid Europe of Nazi oppression (which was accomplished years ago during World War Two) or to alter unfriendly governments. Rather, the Act seeks to require *California corporations* to disclose insurance policy information so that claims can be perfected by *California* residents who are Holocaust survivors, and by *California* residents who are heirs or beneficiaries of Holocaust victims, and so that the ethical character of insurance companies doing business in California can be disclosed to state regulators and to California's citizens. Thus, even if *Zschernig* applied, and even absent congressional support, petitioners' foreign affairs challenge of the HVIRA would fail.

III. CALIFORNIA HAS LEGISLATIVE JURISDICTION UNDER THE DUE PROCESS CLAUSE TO REQUIRE CALIFORNIA INSURANCE COMPANIES TO DISCLOSE POLICY INFORMATION THAT AFFECTS THE WELFARE OF CALIFORNIA RESIDENTS.

Petitioners' other assertion – that the HVIRA exceeds California's legislative jurisdiction under the Due Process Clause – is equally erroneous. The statute falls well within the historic police power of the States.

1. Most cases analyzing legislative jurisdiction concern a choice-of-law question. The issue in those cases, many of which are cited by petitioners, is whether a State has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 313 (1981).[17] Petitioners' legislative jurisdiction challenge to HVIRA, however, does not involve a choice-of-law question. Rather, it turns on the scope of the States' police power.

2. The Constitution gives the States broad authority to protect their citizens. This reservation of "a generalized police power to the States is deeply ingrained in our constitutional history." *United States v. Morrison*, 529 U.S. 598, 619, fn. 8 (2002). That authority is particularly strong

[17] The HVIRA would unquestionably meet a significant contact test. It requires California insurance companies to disclose information that is needed (a) for California residents to obtain benefits under policies issued by the California companies or their affiliates and (b) for Californians to be informed about the ethical character of companies doing business in the State.

in our case, where "the business of insurance is involved – a business to which the government has long had a 'special relation.'" *California State Automobile Association v. Maloney*, 341 U.S. 105, 109-110 (1951) (footnote and citation omitted). Indeed, this Court has stressed that, in the area of insurance, the police power is so broad that a State can even "take over the whole business, leaving no part for private enterprise." *Id.* at 110.

In the instant case, petitioners assert that, because the information they are required to disclose under the HVIRA concerns out-of-state insurance policies, California lacks the power to require that production. This Court, however, has rejected similar challenges to governmental "extraterritorial" authority where considerably greater individual rights were involved. Most notably, in *Skiriotes v. Florida*, 313 U.S. 69, 79 (1941), this Court upheld the right of a State to impose *criminal* penalties on a resident for using diving equipment to harvest sponges in international waters. *Skiriotes* explained that "[w]hen its action does not conflict with federal legislation, the sovereign authority of the State over the conduct of its citizens upon the high seas is analogous to the sovereign authority of the United States over its citizens in like circumstances." *Id.* at 79. See also *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) (affirming criminal law jurisdiction concerning out-of-state act); *Blackmer v. United States*, 284 U.S. 421, 436-37 (1932) (affirming extraterritorial federal subpoena jurisdiction).

3. Given this broad latitude, it is not surprising that this Court has repeatedly recognized the right of States to regulate insurance company practices even where they involve out-of-state activities. In *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 649-650 (1950), for example, this

Court held that Virginia may enjoin a company, located *and operating* in Nebraska, from doing business with Virginia residents unless it submitted to Virginia jurisdiction. Quoting *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 320-321 (1943), this Court reiterated that state cease and desist orders do not violate due process "'merely because they affect business activities which are carried on outside the state.'" *Travelers Health* at 650. Likewise, in *Osborn v. Ozlin*, 310 U.S. 53, 62 (1940), this Court upheld the power of Virginia to require out-of-state insurance companies to sell their policies through resident agents, explaining that "[t]he mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids."

More recently, in *Western & Southern Life Ins. Co. v. State Board of Equalization*, 451 U.S. 648 (1981), this Court upheld a California insurance tax that was designed to influence the policies of other States, against constitutional challenges that included a due process argument that the Court assumed was subsumed in an equal protection claim. *Id.* at 656. The Court explained that the "tax should be sustained if we find that its classification is rationally related to achievement of a legitimate state purpose." *Id.* at 657. The Court concluded that, while "many may doubt the wisdom of" the tax, applying this test it is constitutional. *Id.* at 670-671.

4. Viewed against those standards, the HVIRA is firmly within California's legislative jurisdiction. It is directed to insurance companies doing *business in California*. Moreover, its focus is on having those companies provide critical policy information needed for *California* residents – including the thousands of Holocaust survivors

living in California, as well as their heirs and beneficiaries – to perfect their insurance claims. It therefore furthers the State's "interest in protecting vulnerable groups – including the poor, the elderly, and disabled persons – from abuse, neglect, and mistakes." *Washington v. Glucksberg*, *supra*, 521 U.S. 702, 731 (rejecting Due Process challenge to state ban on physician-assisted suicide).

Finally, the HVIRA helps ensure that companies and their affiliates selling insurance to California's residents meet the State's high ethical standards. Although petitioners question whether this was one of the "true" motives of the California Legislature in enacting the HVIRA, the statute itself expressly states that it is the "responsibility" of these companies to disclose Holocaust-related policy information. Cal. Ins. Code § 13801(e) (West 2003). The Legislature determined that companies refusing to meet their responsibility, or choosing to remain affiliated with such entities, should be denied the privilege of doing business in California. *Id.* § 13806. The statute, on its face, therefore indicates a concern about the ethical character of companies doing business in the State.[18]

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[18] Even if that purpose had not been expressed by the Legislature, as long as the enforcement of ethical standards *could* have been a legislative purpose, the statute should be held constitutional. Under this Court's long-standing general deference to legislative decision making in due process and other contexts, legislation is upheld as long as there is "any state of facts either known or which could reasonably be assumed affords support for it." *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938) (substantive due process). See also *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314-315 (1993), where this Court explained that:

> [T]hose attacking the rationality of the legislative classification [in an equal protection challenge] have the burden to

(Continued on following page)

In seeking to constrict the authority of California and other States to regulate insurance companies doing business within their borders, petitioners ignore the "[d]ual sovereignty" that "is a defining feature of our Nation's constitutional blueprint." *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, ___ [122 S. Ct. 1864, 1870] (2002). The requirement that insurance companies operating in a State report policy information to that State's insurance regulators and citizens that, among other things, reflects upon the ethical character of the company and its affiliates, is fully within the historic police power of the States. The HVIRA is constitutional.

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negative every conceivable basis which might support it. * * * Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. (Citation and internal quotation marks omitted.)

CONCLUSION

The judgment of the court of appeals should be affirmed.

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In The

Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION,
AMERICAN RE-INSURANCE COMPANY, ET AL.,

Petitioners,

v.

JOHN GARAMENDI, IN HIS CAPACITY AS
COMMISSIONER OF INSURANCE FOR
THE STATE OF CALIFORNIA,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE NAIC[1]

The NAIC is a non-profit corporation whose membership consists solely of the principal insurance regulatory officials of the fifty States, the District of Columbia, the territories and insular possessions of the United States. Started in 1871, it has been the nation's oldest association of state government officials. The members of the NAIC completely control the same.

The NAIC performs many services on behalf of state government, including the development and publication of model laws, regulations and bulletins, financial and accounting standards, the management of accreditation standards for and coordination of the review of insurance departments, the operation of extensive financial and regulatory databases, education and training programs for state, federal and international financial regulators, the operation of the Securities Valuation Office and the International Insurers Department, coordination of quarterly national meetings and interim meetings of various NAIC committees, task forces and working groups and the creation and publication of white papers, consumer guides, handbooks, periodicals and the *Proceedings of the NAIC*. Hundreds of state and federal laws make reference to and incorporate NAIC standards and publications.

In filing this *amicus curiae* brief, the NAIC seeks to demonstrate its interest in this proceeding and to fulfill

---

[1] Neither counsel for the parties to this matter authored this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members or its counsel, made a monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this *amicus curiae* brief. Stipulations indicating their consent have been filed with the Clerk of the Court.

the mission of the NAIC, as set out in its Annual Report, to:

> . . . assist state insurance regulators, individually and collectively, in serving the public interest and achieving the following fundamental insurance regulatory goals in a responsive, efficient and cost-effective manner, consistent with the wishes of its members:
>
> 1. Protect the public interest, promote competitive markets and facilitate the fair and equitable treatment of insurance consumers;
>
> 2. Promote the reliability, solvency, and financial solidity of insurance institutions; and
>
> 3. Support and improve state regulation of insurance.

The Executive Committee of the NAIC voted to file this *amicus curiae* brief to demonstrate its support of Respondent John Garamendi, Commissioner of Insurance for the State of California, in this cause. The interest of the NAIC in this matter arises out of the regulatory responsibility vested in each insurance commissioner, director and superintendent to see that all laws respecting insurance companies and the types of policies offered for sale in his or her State are executed faithfully and to safeguard the solvency and financial integrity of insurance companies for the benefit of insurance consumers. The commissioners, directors and superintendents of the various States, the members of the NAIC, are charged with the responsibility of regulating the business of insurance within their jurisdictions pursuant to the

McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*, and State insurance laws.

The members of the NAIC have reviewed the decisions of the U.S. Circuit Court of Appeals and the various briefs filed by the parties in this cause and believe the issues involved are of great interest and concern. The NAIC has extensive experience with the interpretation and application of the McCarran-Ferguson Act and various State laws, many of which are based on NAIC model laws, along with constitutional challenges and administrative law matters. The members of the NAIC are the statutory heads of state insurance departments which have approximately 11,000 staff members, including 282 actuaries, 681 rate and form analysts, and 1,175 financial examiners. NAIC, *2001 Insurance Department Resources Report* Tables 3 and 6 (2002).

With regard to the McCarran-Ferguson Act, this Court has stated that "[t]he views of the NAIC are particularly significant, because the Act ultimately passed was based in large part on the NAIC bill." *Group Life and Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 221 (1979).

The NAIC is strongly committed to the prompt and just resolution of unpaid insurance claims of Holocaust victims, survivors, their heirs and beneficiaries. To that end it established the International Commission on Holocaust Era Insurance Claims (ICHEIC) in 1998 in conjunction with several European insurance companies, European regulators, representatives of several Jewish organizations and the State of Israel.

The NAIC's members ask that this Honorable Court uphold the right of the State of California to regulate insurance companies that do business within its borders

by enacting and enforcing the Holocaust Victim Insurance Relief Act (HVIRA), which requires information from insurance companies within the State of California that the California State Legislature, in its judgment, has determined is "necessary to protect the claims and interests of California residents. . . . " Cal. Ins. Code § 13801(f). The members of the NAIC believe that such an outcome is in the best interest of insurance consumers, to whom all insurance commissioners, superintendents and directors (all of whom are members of and control the NAIC) are charged by both State and Federal law to protect.

SUMMARY OF ARGUMENT

Amicus curiae National Association of Insurance Commissioners urges this Honorable Court to affirm the decision of the U.S. Court of Appeals in this cause. Congress, through the McCarran-Ferguson Act, the U.S. Holocaust Assets Commission Act of 1998 and the Gramm-Leach-Bliley Act, has given full authority to the State of California to regulate the business of insurance by means of the Holocaust Victim Insurance Relief Act. The past decisions of this Court fully support the concerns and actions of the State of California in this matter. Should the reasoning of the Petitioners be sustained, state insurance regulators will be gravely hampered in their ability to oversee the safety, soundness, integrity, reputation and solvency of insurance companies that have foreign or alien affiliates. The members of the NAIC do not believe such an outcome is in the best interest of our nation's citizens. The past decisions of this Court and the laws enacted by

Congress dictate that the decision of the U.S. Court of Appeals is correct and should be affirmed.

ARGUMENT

A. THE BUSINESS OF INSURANCE IS SO IMBUED WITH A COMPELLING PUBLIC INTEREST THAT IT JUSTIFIES CALIFORNIA'S ENACTMENT OF THE HVIRA.

This Court has long held that the business of insurance is so qualitatively different from ordinary commerce that government is fully justified to regulate it by methods and to degrees far different from ordinary business. Insurance pervades our society and is an indispensable factor in our economic system. Insurance companies amass and control incredible sums of money in a fiduciary role for the future benefit of their insureds.[2] At its core insurance is a complicated, contingent promise to pay at some time that may be far in the future significant sums of money. Families and businesses literally stake their future on the promises insurance companies make to them. The nature, structure and mechanisms of insurance are so complex that ordinary citizens rely on and demand governmental regulation to ensure that insurance companies remain solvent, act ethically, charge fair rates and pay claims.

[2] Year 2000 combined total assets for the property/casualty and life/health segments were approximately $4,213,918,070,000. NAIC, *Statistical Compilation of Annual Statement Information for Property/Casualty Companies in 2000* Table 2 (2000); NAIC, *Statistical Compilation of Annual Statement Information for Life/Health Companies in 2000* Table 2 (2000).

Congress, in passing the McCarran-Ferguson Act, expressed its intent to allow state governments to continue to oversee the business of insurance because of their long experience and expertise in this very complicated and arcane area of financial regulation.

This Court has long recognized these facts. "The underlying principle is that business of certain kinds hold such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation. . . . [T]he business of insurance has very [definite] characteristics, with a reach of influence and consequence beyond and different from that of the ordinary businesses of the commercial world. . . . It . . . according to the sense of the world from the earliest times, – certainly the sense of the modern world, – is of the greatest public concern." *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389, 411-415 (1914). *Accord*, *California State Auto. Ass'n Inter-Insurance Bureau v. Maloney*, 341 U.S. 105, 109-110 (1951). The members of the NAIC believe these words are even more true now than when the Court wrote them almost ninety years ago.

The California law at issue here, the Holocaust Victim Insurance Relief Act of 1999 (HVIRA), is a law that regulates insurance companies in California. Contrary to what has been asserted by the companies contesting the law, one of its expressed purposes is to "protect the claims and interest of California residents." Cal. Ins. Code § 13801(f). While the opponents of the law argue that its purpose is to force alien insurance companies to pay claims to non-California citizens based on polices purchased in Europe, the statute on its face has the expressed purpose to protect California residents. No state insurance regulator would ever grant a license to an insurance company that has

refused to provide policy information. For an insurance company to be financially affiliated with a company that is refusing to provide the information people need in order to perfect a claim – information that is not available elsewhere – is a matter of no small consequence to that company's insurance regulator and to the public.

An insurance company's good name is essential to its solvency and its ability to pay claims in the future. The members of the NAIC believe the California legislature was fully justified in requiring all companies doing business in California to produce any information that, in the legislature's judgment, could affect the company's reputation and good name in order to be assured that California citizens will have continued confidence in the company. Just as government regulators go to great extremes to ensure the public has confidence in the banking system, insurance regulators likewise go to great extremes to ensure the public will have confidence their insurance company will pay their claims if and when they come due in the future.

The briefs of Petitioner and Respondent Gerling Companies devote a great deal of argument to the proposition that the HVIRA is inefficient, it only affects a small number of claimants, it is not the best strategy to use for for the above goals and that, quite simply, the California legislature was unwise in enacting the legislation. However, " . . . the courts are not enpowered to second-guess the wisdom of state policies." *Western and Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 670 (1981). "Whether California's program is wise or unwise is not our concern." *California State Auto. Ass'n Inter-Insurance Bureau*, 341 U.S. at 110.

Likewise, the Petitioner and Respondent Gerling Companies briefs quote comments of various state officials at press conferences and hearings as to the "true" purpose that the California Legislature had in mind when it passed the HVIRA. Yet the legislation itself states that one of its purposes is to "protect the claims and interest of California residents." The NAIC members believe that is enough, and the miscellaneous post-enactment quotes from a myriad of state officials that were selectively pulled from the public media and referenced in Petitioner and Respondent Gerling Companies' briefs are unqualifiedly irrelevant in a court of law.

B. CONGRESS, IN ENACTING THE MCCARRAN-FERGUSON ACT, GRANTED TO CALIFORNIA FULL AUTHORITY TO REGULATE INSURANCE COMPANIES BY MEANS OF THE HVIRA.

This Court has held that the intention of the McCarran-Ferguson Act was to "broadly . . . give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946). One court noted this meant that ". . . state authority in the area of insurance regulation should enjoy a presumption of validity. We refuse to adopt the position of requiring the least intrusive means of protecting insurance company-policyholder relations. . . . " *Professional Investors Life Ins. Co., Inc. v. Roussel*, 528 F.Supp. 391, 402 (D. Kan. 1981).

Congress recently reaffirmed the role of the states in regulating the business of insurance when it passed the Gramm-Leach-Bliley Act:

> (a) State Regulation of the Business of Insurance. The Act entitled "An Act to express the intent of Congress with reference to the regulation of the business of insurance" and approved March 9, 1945 (15 U.S.C. 1011 et seq.) (commonly referred to as the "McCarran-Ferguson Act") remains the law of the United States.
>
> (b) Mandatory Insurance Licensing Requirements. No person shall engage in the business of insurance in a State as principal or agent unless such person is licensed as required by the appropriate insurance regulator of such State in accordance with the relevant State insurance law. . . .

15 U.S.C. § 6701. Congress also stated in Title III of the Gramm-Leach-Bliley Act that "[t]he insurance activities of any person . . . shall be functionally regulated by the States, subject to section 104." 15 U.S.C. § 6711. These provisions became law on November 12, 1999.[3]

By specifically including these provisions in the Gramm-Leach-Bliley Act in 1999, "Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the

[3] The HVIRA became effective on October 10, 1999.

whole weight of its power behind the state systems, notwithstanding these variations." *Prudential Ins. Co.*, 328 U.S. at 430. The members of the NAIC believe that Congress has thus thrown the whole weight of its power behind California's insurance regulatory system, including the HVIRA. The U.S. Court of Appeals for the 9th Circuit certainly came to this conclusion. "[W]e conclude that Congress was aware of the states' involvement in this area and, at least implicitly, encouraged laws like HVIRA." *Gerling Global Reinsurance Corp. of America v. Low*, 240 F.3d 739, 749 (9th Cir. 2001).

The Court has previously ruled that "[i]f Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge. Congress removed all Commerce Clause limitations on the authority of the States to regulate and tax the business of insurance when it passed the McCarran-Ferguson Act ... [t]he unequivocal language of the Act suggests no exceptions." *Western and Southern Life Ins. Co.*, 451 U.S. at 652-653. These words stand in stark contrast to the assertions of the Petitioner and others who want this Court to rewrite the McCarran-Ferguson Act.

Respondent Gerling Companies argues in its brief that the McCarran-Ferguson Act limits state insurance regulators to whatever authority they had to regulate under the Commerce Clause and the Due Process Clause that was set out by this Court in its controlling decisions at the time the Act became effective in 1946. *Brief for the Respondents – Gerling Companies – in Support of Petitioners*, p. 33-35. The members of the NAIC strongly disagree. Even the legislative history cited by Respondent Gerling

Companies refutes this assertion. "Briefly, your committee is of the opinion that we should provide for continued regulation and taxation of insurance by the States, subject always, however to the limitations set out in the controlling decisions of the United States Supreme Court. . . . " Cong. Serv., 79th Cong., 1st Sess. 1945, pp. 671-672. This particular statement, from the House Report, did not say the limitations will be set by the then current controlling decisions of this Court. It said just the opposite, that the limitations will always be set by the controlling decisions of the Court. This Court also has previously rejected this argument. "We reject appellee's argument that the McCarran-Ferguson Act altered constitutional standards other than those derived from the Commerce Clause." *Western and Southern Life Ins. Co.*, 451 U.S. at 656. "Congress, of course, does not have the final say as to what constitutes due process under the Fourteenth Amendment. And while Congress has authority by § 5 of that Amendment to enforce its provisions [citing cases], the McCarran-Ferguson Act does not purport to do so." *State Board of Ins. v. Todd Shipyards Corp.*, 370 U.S. 451, 457 (1962).

C. STATES MUST HAVE THE ABILITY TO OBTAIN INFORMATION CONCERNING AFFILIATE ENTITIES OF INSURERS DOING BUSINESS WITHIN THEIR BORDERS IN ORDER TO PROTECT THEIR CITIZENS.

The United States in its *amicus curiae* brief argues that it is simply impermissible for a state insurance regulator to "compel conduct beyond the boundaries of the State" by requiring the "collection, compilation, and disclosure of detailed information, presumably located in Europe." *Brief for the United States as Amicus Curiae*

Supporting Petitioners, p. 24. The members of the NAIC believe that such a prohibition, should it ever come about, would be disastrous for insurance regulation.

In this era of vast, multi-national, financial holding companies, with interlocking directorates and sophisticated funding and reinsurance arrangements, any financial regulator would be horrified at the prospect of not having the full ability and right to inquire of the reputation, character, financial and managerial details of an insurer's parent and affiliates. If such an insurer should ever state that it cannot supply such information because of some foreign legal prohibition, the regulator would not hesitate to take the appropriate action to protect his or her state's citizens regardless.

The information required is certainly not limited to financial data. This Court has previously noted that trustworthiness and competence is equally important to the licensing process. "[T]he requirement that the license shall issue only after a finding of trustworthiness and competence by the commissioner cannot be taken to be other than an appropriate means of safeguarding the public against the obvious evils arising from the lack of those qualifications." *Robertson v. California*, 328 U.S. 440, 450 (1946).

If Petitioner's arguments are sustained, alien insurers could have the ability to withhold any type of information from financial regulators, while domestic insurers won't. This would not be a level playing field. "And in the view of the well-known conditions of competition in this field, such a result not only would free out-of-state insurance companies and their representatives of the regulation's effect, thus giving them an advantage over local competitors, but

by so doing would tend to break down the system of regulation in its purely local operation." *Id.*, 328 U.S. at 449. "In short, the result would be ultimately to force all of the states to accept the lowest standard for conducting the business permitted by one of them, or, perhaps, by foreign countries." *Id.*, 328 U.S. at 460.

The HVIRA does not require any analysis, inquiry or evaluation of alien financial or privacy laws. It does not require the commissioner or any judge to investigate their requirements or enforceability. It simply requires an insurance company doing business within California's borders to produce information the California legislature, in its wisdom, determined is necessary "to protect the claims and interests of California residents." In *Zschernig v. Miller*, 389 U.S. 429 (1968), the Court found that the probate law at issue required "minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation whether the fact that some received delivery of funds should 'not preclude wonderment as to how many may have been denied 'the right to receive'. . . . " *Id.*, 389 U.S. at 435. This is the antithesis of HVIRA, which requires no inquiry whatsoever except whether or not insurers present within California's borders produce the appropriate regulatory information. Thus, the members of the NAIC believe that the HVIRA is well within California's legislative jurisdiction and is a proper exercise of its police power.

CONCLUSION

The members of the National Association of Insurance Commissioners believe that the Court should reaffirm the

right of the State of California to protect its citizens by enacting and enforcing the Holocaust Victim Insurance Relief Act. Because the business of insurance is affected with a compelling public interest and plays such a crucial role in our economy and the daily lives of our nation's citizens, because regulators must have the legal ability to oversee the integrity, reliability and solvency of insurance companies, because Congress has again confirmed that it has given to the States the duty to oversee the integrity of this industry and because the reliability, solvency, integrity and reputation of countless insurers are dependent on the conduct of their foreign and alien affiliates, the members of the National Association of Insurance Commissioners ask this Honorable Court to affirm the decision of the U.S. Court of Appeals in this cause.

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